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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CITIZENS TO PRESERVE OVERTON)
PARK, INC.)
192 Williford St., Memphis, Tenn.)

WILLIAM W. DEUPREE, SR.,)
1730 Glenwood Pl., Memphis, Tenn.)

SUNSHINE K. SNYDER,)
327 Kenilworth Pl., Memphis, Tenn.)

SIERRA CLUB,)
220 Bush St., San Francisco, Calif.)

NATIONAL AUDUBON SOCIETY,)
1130 5th Ave., New York, N.Y.)

vs.)

CIVIL NO. C-70-17

JOHN A. VOLPE,)
Sec. of Dept. of Transportation)
Federal Office Bldg.)
10-800 Independence Ave., S.W.)
Washington, D.C.)

CHARLES W. SPEIGHT,)
Commissioner)
Tennessee Department of Highways)
Highways Building)
Nashville, Tennessee)

RELEVANT DOCKET ENTRIES

1/28/70

Filed copy of Order transferring case from District of Columbia to Western District of Tennessee, including the following papers: Complaint, summons and return, Motion for Preliminary Injunction, Affidavit of Arlo I. Smith, Affidavit of Sunshine Kidd Snyder, Affidavit of Sunshine

Kidd Snyder, Motion for Change of Venue, Order denying Motion for Change of Venue, Motion to Dismiss, Amendment of complaint, Affidavit of John W. Vardaman, Jr., Plaintiffs' response to Defendant's Motion to Dismiss, Notice of Deposition, Motion for Protective Order, Motion to Dismiss amended complaint, Response to Defendant's Motion for Protective Order, Response to Government's Motion to Dismiss Amended Complaint, Response to Defendant's Motion for Protective Order, Response to Government's Motion to Dismiss Amended Complaint, Affidavit of Charles H. Callison and Order granting defendant's Motion for Protective Order.

- 2/3/70 Filed Amended Complaint for Declaratory Judgment and Injunction.
- 2/5/70 Filed Plaintiff's Additional Motion for Preliminary Injunction.
- 2/20/70 Filed Motion to Dismiss on behalf of defendant, Charles W. Speight, Commissioner, Department of Highways.
- 2/20/70 Filed Affidavit of Virgil A. Rawlings, filed on behalf of Charles W. Speight, Commissioner, State of Tennessee, Department of Highways—exhibit attached.
- 2/20/70 Filed Affidavit of Henry Loeb, Mayor of the City of Memphis, filed on behalf of Charles W. Speight, Commissioner, Tennessee Department of Highways.
- 2/20/70 Filed Affidavit of Thomas E. Maxon, City Engineer of the City of Memphis, filed on behalf of Charles W. Speight, Commissioner Tennessee Department of Highways.

- 2/20/70 Filed Affidavit of Hal S. Lewis, on behalf of Charles W. Speight, Commissioner, Tennessee Department of Highways.
- 2/20/70 Filed Affidavit of William S. Pollard, Jr., filed on behalf of Charles W. Speight, Commissioner, Tennessee Department of Highways.
- 2/20/70 Filed Resolution of Memphis Park Commission.
- 2/20/70 Filed Affidavit of Luther W. Keeler, filed by and on behalf of the defendant, Charles W. Speight, Commissioner with exhibits.
- 2/20/70 Filed Affidavit of Henry K. Buckner, Jr.
- 2/20/70 Filed Motion for Summary Judgment on behalf of defendant, John A. Volpe, etc.
- 2/26/70 Filed Memorandum Decision and Judgment. Motion of Plaintiffs for a temporary injunction denied and motion of defendants for Summary Judgment be granted and the action is dismissed. Copies handed Wm. Walsh, Charles Newman, U.S. Attorney Copies mailed Vardaman and David Pack and Hanover.
- 3/2/70 Filed Notice of Appeal by Citizens to Preserve Overton Park, Inc.—Memorandum and Decision and Judgment entered 2/26/70 and Orders set forth denying plaintiffs Motion for Preliminary Injunction and granting the defendant's Motion for Summary Judgment and Dismissing Action. Copies mailed Tom Turley, David Pack, Thomas Flannery, Alan Hanover, Donald Harris, Jr. and Donald C. Hays.
- 3/17/70 Filed Notice of Appeal by Sierra Club and National Audubon Society, Inc.

9/29/70	Opinion of Court of Appeals.
10/30/70	Order Denying Petition for Rehearing and Denying Application for Stay.
11/19/70	Judgment of Court of Appeals.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

**COMPLAINT
FOR DECLARATORY JUDGMENT AND INJUNCTION**

Plaintiffs, for their complaint against defendant herein,
allege as follows:

**Nature of the Action,
Jurisdiction and Venue**

1. This action for a declaratory judgment, injunction, and for such other and further relief as may be deemed necessary arises under the Constitution and laws of the United States, namely the Fifth and Fourteenth Amendments to the United States Constitution; 23 U.S.C. § § 128, 138, 102; and 49 U.S.C. § 1653(f). There exists between the parties an actual controversy, justiciable in character. The matter in controversy exceeds the sum of \$10,000, exclusive of interest and costs. This Court has jurisdiction under 5 U.S.C. §§ 701-706; 28 U.S.C. §§ 1331(a), 1332, 1361, 2201-02; and District of Columbia Code (1967 ed.) § 11-521. The defendant may be found in, has headquarters in, and resides in the District of Columbia in the official capacity in which he is named as defendant, or otherwise, and venue lies in the District of Columbia under 28 U.S.C. § 1391(b).

Plaintiffs

2. Citizens to Preserve Overton Park is a Tennessee corporation which has its principal place of activity in Memphis, Tennessee. It was organized for the purpose of preserving, protecting and enhancing Overton Park as a park land and recreation area. Its organizers and members are residents of Memphis, Tennessee who use Overton Park as a park land and recreation area and who have been active since 1964 in efforts to preserve and protect Overton Park as a park land and recreation area.

3. Mr. William W. Deupree is the owner of property located at 1730 Glenwood Place, Memphis, Tennessee. He is a taxpayer of the City of Memphis, the State of Tennessee and the United States.

4. Mrs. Sunshine K. Snyder is an owner of property located at 327 Kenilworth Place, Memphis, Tennessee which is approximately 1150 feet away from the proposed route of Project No. I-40-1(90)3 (as described in paragraph 7 below). That property will be adversely affected by the construction of that Project and its use as an Interstate Highway. Mrs. Snyder pays taxes to the City of Memphis, the State of Tennessee and the United States.

Defendant

5. Defendant John A. Volpe is the Secretary of the Department of Transportation and as such has responsibility for the administration of the various federal-aid highway programs, including that relating to the National System of Interstate and Defense Highways (the "Interstate System") of which Project No. I-40-1(90)3 is a part.

Overton Park

6. Overton Park is a 342-acre park and recreation area located in midtown Memphis, Tennessee. Since 1901 it has been publicly owned by the City of Memphis. Within the

Park are located the Overton Park Zoo, a 9-hole municipal golf course, an outdoor theater, an art gallery, an art academy, a nature trail, a bridle path, a small lake, a formal garden, picnic areas and playgrounds and substantial woodland. In 1967 approximately 1½ million people visited the Zoo alone.

Project No. I-40-1(90)3

7. Federal-Aid Highway Project No. I-40-1(90)3 (the "Project") is a six-lane, limited access, interstate highway to be used for private and commercial purposes which is a portion of Interstate Route 40. The Project will begin at McLean Boulevard in Memphis, Tennessee and extend eastward proceeding through the entire width of Overton Park, a distance of approximately 4,800 feet, and then extend to Maris Street. At the western end of Overton Park, the Project will be approximately 250 feet in width; at the eastern end it will be approximately 450 to 500 feet in width. There will be a 1200-foot access ramp within the eastern end of the park. The Project will include a 40-foot median strip between the eastbound and westbound lanes. The current plans contemplate that the Project will vary between being slightly depressed in some areas to a five- to six-foot fill at Lick Creek. It will not be tunneled. The Project will require the use of at least approximately 26 acres of Overton Park. It will affect adversely many more acres. The right of way for the Project runs along one side of the Zoo, one side of the playgrounds, and the playing fields, passes by the tip of the lake, and then passes through a heavily wooded area of the Park. Construction of the Project and its use as an interstate highway will have an adverse effect on the Zoo, the playing fields, use of the lake and will require the destruction of some of the wooded area of the Park.

8. On April 19, 1968, the Federal Highway Administrator preliminarily approved the proposed location of the Project.

9. On or about June 4, 1969, the Department of Highways for the State of Tennessee (hereinafter the "Tennessee Highway Department") requested that the defendant or his subordinates approve a design of the Project which the Tennessee Highway Department submitted to the United States Bureau of Public Roads. On or about November 5, 1969, Defendant Volpe approved that proposed design. Alternatively Defendant Volpe approved that design on the condition that the design be modified in accordance with certain requirements which he stipulated. The Tennessee Highway Department has given notice that the design of the Project will be modified according to Defendant Volpe's stipulation.

10. On or about November 10, 1969, the City of Memphis transferred to the State of Tennessee property in Overton Park for the right of way for the Project. The Tennessee Highway Department has stated that on or about December 19, 1969, it proposes to take bids for construction of parts of the Project, including a part of the Project which will pass through Overton Park.

11. The Tennessee Highway Department is proceeding with the construction of the Project on the assumption that it will receive from the Federal Government, pursuant to an obligation undertaken by Defendant Volpe, reimbursement of up to 90 percent of the costs of the construction of the Project. The Tennessee Highway Department would not proceed with construction of the Project if it believed that such federal funds could not lawfully be paid to the State of Tennessee.

12. If Defendant Volpe is enjoined from taking any further action with respect to the Project or enjoined from obligating the Federal Government to reimburse, or from reimbursing or paying, the Tennessee Highway Department 90 percent of its cost of the construction of the Project, the Tennessee Highway Department will not construct the Project through Overton Park. Unless Defendant Volpe is so restrained, the Tennessee Highway Department will begin construction of that part of the Project which passes through Overton Park immediately after taking bids.

**Violations of Federal Statutes
23 U.S.C. § 128**

13. Section 128 of Title 23 provides:

“(a) Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway.

“(b) When hearings have been held under subsection (a), the State highway department shall submit a copy of the transcript of said hearings to the Secretary, together with the certification.”

Paragraph 8.c(1) of the Policy and Procedure Memorandum 20-8 (hereinafter PPM 20-8), 34 Fed. Reg. 727 (1969) 23 C.F.R. App. A, promulgated by the Department of Transportation to implement 23 U.S.C. § 128 provides:

“(1) The State highway department shall provide for the making of a verbatim written transcript of the oral proceedings at each public hearing. It shall submit a copy of the transcript to the division engineer within a reasonable period (usually less than 2 months) after the public hearing, together with:

“(a) Copies of, or reference to, or photographs of each statement or exhibit used or filed in connection with a public hearing.

"(b) Copies of, or reference to, all information made available to the public before the public hearing."

Paragraph 8.b(2) provides:

"(2) Provision shall be made for submission of written statements and other exhibits in place of, or in addition to, oral statements at a public hearing. The procedure for the submissions shall be described in the notice of public hearing and at the public hearing. The final date for receipt of such statements or exhibits shall be at least 10 days after the public hearing."

14. On May 19, 1969, the Tennessee Highway Department held a public hearing with respect to the Project. According to the notice published by the Tennessee Highway Department the objectives of the hearing were:

"to provide the local officials and other citizens with complete factual information with respect to the tentative schedules for right-of-way acquisition and construction, and the location, the design features, and the economic, social and environmental effects which the project will have on the community and to acquaint the public with the relocation assistance offered by the State to those persons whose homes or businesses may be affected because of the proposed construction of said project.

"Following the presentation the local officials and citizens will be afforded the opportunity to be heard relative to the project to provide the Department with factual information which is pertinent to the specific location and major design features, including the social, economic, environmental and other effects thereof, which will best serve the public interest."

15. On or about June 4, 1969, a transcript containing some of the testimony given at the May 19, 1969, hearing was submitted to the Bureau of Public Roads. The Tennessee Highway Department, by Mr. Henry K. Buckner, certi-

fied to the Bureau of Public Roads that the transcript was a partial true transcript of all that was said at this hearing. It also certified that,

“the Department of Highways has considered the economic and social effects of the location of the project, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the affected community.”

16. The transcript of the public hearing held on or about May 19, 1969, which the Tennessee Highway Department submitted to the Defendant Volpe, did not contain testimony of at least eight witnesses who appeared and gave oral testimony at that hearing. Six of those witnesses opposed either, or both, the location and the design of the Project.

17. The Tennessee Highway Department has not submitted to Defendant Volpe a copy of the verbatim written transcript of the oral proceeding at the public hearing held on or about May 19, 1969, with respect to the Project. Defendant Volpe's approval of the Project without having received such a transcript violated 23 U.S.C. § 128(b) and PPM 20-8, Paragraph 8.c(1).

18. The notices of the public hearing scheduled for May 19, 1969, published in the Commercial Appeal, Memphis, Tennessee, on April 15, 1969, and May 12, 1969, did not describe the procedure for submission of written statements and other exhibits in place of, or in addition to, oral statements at the public hearing. These notices did not comply with 23 U.S.C. § 128 and the rules promulgated thereunder by the Department of Transportation, including PPM 20-8, Paragraph 8.b(2), 34 Fed. Reg. 727 (1969), 23 C.F.R. App. A. In the absence of proper notices, the hearing on May 19, 1969, did not comply with 23 U.S.C. § 128 including the rules promulgated thereunder by the Department of Transportation including PPM 20-8, Paragraph 10.d. Defendant Volpe's approval of the Project in the absence of the hearings that comply with Section 128 is illegal.

23 U.S.C. § 138, 49 U.S.C. § 1653(f)

19. Section 138 of Title 23, United States Code, provides:

"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

20. Construction of the Project will require use of a number of acres of park land and recreation area from Overton Park. Overton Park is a park and recreation area of state and local significance. Overton Park has been determined by the state and local officials having jurisdiction thereof to be of state and local significance.

21. Neither Defendant Volpe nor any previous Secretary of Transportation has made any finding that there is no feasible and prudent alternative to the use of such public

park and recreation areas. Defendant Volpe has made no finding that the program for the Project includes all possible planning to minimize the harm to such park and recreation areas. In the absence of such findings, his approval of the Project has violated 23 U.S.C. § 138 and 49 U.S.C. § 1653(f).

22. There are feasible alternatives to the use of such park and recreation areas. One or more of the feasible alternatives are prudent alternatives. The Project does not include all possible planning to minimize harm to such park and recreation areas.

23 U.S.C. § 102

23. Defendant Volpe plans to treat his approval of the Project as a contractual obligation of the Federal Government and to make expenditures to the State of Tennessee pursuant thereto. Because that approval, having been given in violation of 23 U.S.C. §§ 128, 138, and 49 U.S.C. § 1653 (f), is null and void and without legal effect, such expenditures will violate 23 U.S.C. § 102.

Prayer

WHEREFORE, Plaintiffs pray as follows:

1. That the actions and proposed actions of the defendant alleged herein be declared and adjudged unlawful;
2. That the defendant be permanently enjoined from taking any further action whatever relating to the Project unless and until he has complied with the provisions of Title 23 of the U.S. Code, and other statutes referred to herein;
3. That pending disposition of this action, this Court preliminarily enjoin the defendant from (1) taking any further action with respect to the Federal-Aid Highway Project No. I-40-1(90)3 ("the Project"), (2) treating the approval of the design of the Project which defendant granted on or

about November 5, 1969, as a basis for any further action with respect to that Project, or (3) obligating or disbursing any funds to the Department of Highways for the State of Tennessee for this Project.

4. That the plaintiffs recover costs and attorney fees; and

5. That the plaintiffs have such other and further relief as the Court may deem appropriate.

/s/ John W. Vardaman, Jr.
 Wilmer, Cutler & Pickering
 900-17th Street, N.W.
 Washington, D.C. 20006
 Telephone: 296-8800

Of Counsel:

Attorney for Plaintiffs

Wilmer, Cutler & Pickering
 900-17th Street, N.W.
 Washington, D.C. 20006
 December 2, 1969

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

State of Tennessee)	
)	AFFIDAVIT OF
SS)	
)	Arlo I. Smith
County of Shelby)	

I, Arlo I. Smith, after being duly sworn, depose and say:

1. I am chairman of the Citizens to Preserve Overton Park, a civic association which has its principal place of activity in Memphis, Tennessee. The association was organ-

ized in 1964 for the purpose of preserving, protecting and enhancing Overton Park as a park land and recreation area. Among the association's activities have been attending meetings and hearings to oppose and to suggest alternatives to the proposed Federal Aid Highway Project No. I-40-1 (90)3, hereinafter "the Project" and any other encroachments upon Overton Park. We have also contacted the Park Commission and other agencies within the city to make suggestions concerning excessive parking in Overton Park, the establishment of nature trails and guides for Overton Park and other suggestions all designed to enhance and preserve Overton Park and other parks in Memphis as park lands and recreation areas. The association is composed of individuals who reside in Memphis, who use Overton Park as a park land and recreation area, and who are tax payers of the State of Tennessee.

2. For the past several years I have tried to follow closely all proposals, actions and developments relating to the construction of the proposed Project, or any other highway project which would pass through or otherwise affect Overton Park. This activity has included research and study concerning the activity of Memphis City Council, the Department of Highways for the State of Tennessee, the Department of Transportation and the Memphis Park Commission. As a result of these activities, and on information and belief, I believe the following actual assertions to be true and correct.

3. Mr. William W. Deupree, Sr., is the owner of property located at 1730 Glenwood Place, Memphis, Tennessee. He is a tax payer of the City of Memphis and the State of Tennessee.

4. Mrs. Sunshine K. Snyder is the owner of property located at 327 Kenilworth Place, Memphis, Tennessee, which is approximately 1150 feet away from the proposed route of the Project. That property will be adversely affected by the construction of that Project and its use as an Interstate Highway.

5. Defendant John A. Volpe is the Secretary of the Department of Transportation and as such has responsibility for the administration of the various federal-aid highway programs, including that relating to the National System of Interstate and Defense Highways (the "Interstate System") of which the Project is a part.

6. Overton Park is a 342 acre park and recreation area located in midtown Memphis, Tennessee. Since 1901 it has been publicly owned by the City of Memphis. Within the Park are located the Overton Park Zoo, a 9-hole municipal golf course, outdoor theater, nature trail, bridle path, art academy, art gallery, playgrounds, small lake, formal garden, and picnic areas. Its 155-170 acres of Oak-Hickory climax forest is over half of the woodland park land in Memphis as of 1965. It is estimated by the Zoo Director that in 1967 approximately 1½ million people visited the Zoo alone. I would estimate that many additional people visited the park that year. Official figures for 1968 are not available at this time. An officially recognized Boy Scout Trail is used annually by scouts from ten states.

7. The Project is a six-lane, limited access, interstate highway to be used for private and commercial purposes which will be a portion of Interstate Route 40. The Project will begin at McLean Boulevard in Memphis, Tennessee, and extend eastward proceeding through the entire width of Overton Park, a distance of approximately 4,800 feet, and then extends to Maris Street. At the western end of Overton Park, the Project will be approximately 250 feet in width; at the eastern end it will be approximately 450-500 feet in width. There will be a 1200 foot access ramp on the east side within the park. The Project will include a 40-foot median strip between the eastbound and westbound lanes. The current plans contemplate that the Project will be variously slightly depressed from grade to 5-6 feet fill at Lick Creek, but not tunneled. The Project will require the use of at least approximately 26 acres of Overton Park. It will affect adversely many more acres.

8. On April 19, 1968, Federal Highway Administrator L. K. Bridwell preliminarily approved the proposed location of the Project, but not the design.

9. On or about June 4, 1969, the Department of Highways for the State of Tennessee submitted to the United States Bureau of Public Roads a design for the Project and requested approval of that design. On or about November 5, 1969 Defendant Volpe announced that he had approved the proposed design of the Project submitted by the Department of Highways for the State of Tennessee, but with certain design modifications to be submitted for approval. The Tennessee Department of Highways has given notice that the design of the Project will be modified according to recommendation which Defendant Volpe made in approving the design.

10. On November 10, 1969 the City of Memphis transferred to the State of Tennessee property in Overton Park for the right of way for the Project. The State Department of Highways has announced that on December 19, 1969 it proposes to take bids for construction of parts of the Project, including a part of the Project which will pass through Overton Park.

11. Prior to Defendant Volpe's approval on November 5, the Mayor of Memphis and state highway officials made numerous public statements that the construction of the Project would have to await Volpe's approval of the design. On occasion they have stated that if he did not approve the Project, the Expressway would not be built. On information and belief, the Department of Highways of the State of Tennessee is proceeding with construction of the Project upon the assumption that in due course it will receive from the Federal Government, pursuant to an obligation undertaken by Defendant Volpe, 90 percent of the cost of the construction of the Project. On information and belief, the Department of Highways for the State of Tennessee would not proceed with construction of the Project if it believed that such federal funds could not lawfully be paid to the State of Tennessee.

12. On information and belief, if Defendant Volpe is enjoined from taking any further action with respect to the Project or enjoined from reimbursing or paying the Department of Highways for the State of Tennessee 90 percent of its cost of the construction of the Project, the Highway Department of Tennessee will not construct the Project through Overton Park. Unless so restrained, the Department of Highways for the State of Tennessee will begin construction of that part of the Project which passes through Overton Park immediately after taking bids and signing contracts.

13. Notices announcing a public hearing to be held on May 19, 1969 with respect to the Project were published in the Commercial Appeal, on April 15, 1969 and on May 12, 1969. Copies of those notices are attached hereto as Exhibits A and A-1.

14. I attended that hearing and was present from the beginning until the end of the hearing. The representatives of the Department of Highways for the State of Tennessee did not give a complete factual presentation on the dimensions, full design of the Project and upon the environmental and social impact on Overton Park and the surrounding neighborhoods. Mr. Sam Morrison, the State Highway engineer who was scheduled to be the first witness to present such information left the hearing without testifying and without hearing all of the testimony given. Also, Mr. Douglas Warpole, Chief of Data Interpretation, did not make his scheduled presentation. At least 13 witnesses appeared and testified orally in opposition in either to the alignment or design of the Project. Thirteen additional individuals and associations submitted statements opposing the Project.

15. A transcript containing some of the testimony given at the May 19, 1969 hearing was submitted to the Bureau of Public Roads. On June 4, 1969 Mr. Henry K. Buckner certified to the Bureau of Public Roads that the transcript was a partial true transcript of all that was said at this hearing. He also certified that,

"the Department of Highways has considered the economic and social effects of the location of the project, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the affected community."

A copy of that certification is attached hereto as Exhibit B.

16. The Citizens to Preserve Overton Park learned for the first time by letter to me dated July 16, 1969, from Clarence E. Elkins, Jr., Staff Attorney, that the transcript did not contain the testimony of all the witnesses who testified at the May 19, 1969 hearing. A copy of this letter is attached as Exhibit C.

17. By letter dated May 21, 1969, Mr. Henry K. Buckner, Jr., Attorney for the Department of Highways for the State of Tennessee, stated that he would provide Mrs. Sara N. Hines with a copy of the transcript of the May 19, 1969 hearing. A copy of that letter is attached as Exhibit D. Mr. Buckner sent a copy of that transcript, which he stated had been submitted to the Bureau of Public Roads, to Mrs. Hines on October 27, 1969. I have examined a copy of the transcript of the May 19, 1969 hearing, which was provided to Mrs. Hines. That transcript does not contain the testimony of the last eight witnesses who appeared and gave oral testimony at that hearing. Six of those witnesses opposed either, or both, the design or the location of the Project. These witnesses include the widow of a direct descendant of the man for whom Overton Park is named, two officials of the Department of the Interior, and a representative of the National Recreation & Park Association, and, in addition myself, as Chairman of Citizens to Preserve Overton Park. The transcript also omitted questions which I asked with respect to: dates, locations, and by whom alternate routes were presented to the Citizens of Memphis; and the names of both engineering and non-engineering personnel who served as consultants for the State Highway

Department. These questions have yet to be answered, although Mr. Buckner promised them.

18. By letter of July 18, 1969, Mr. John S. Logan informed the secretary of Citizens to Preserve Overton Park that all those witnesses whose testimony was not included would be contacted "within the next few days." He also informed her that the "public hearing transcript and attachments were forwarded to the Washington office of the Bureau of Public Roads on June 24, 1969." A copy of that letter is attached as Exhibit E.

19. At least one of those witnesses has not been contacted by the State Highway Department or the Department of Transportation concerning his testimony.

20. If the Project is constructed according to the plans announced at the May 19, 1969 hearing, it will require the use of a number of acres of park land and recreation area from the Overton Park. Overton Park is a park land and recreation area of state and local significance and has been determined so by state and local officials having jurisdiction over the Park. The Memphis Park Commission passed a resolution in 1964 opposing the location of the highway in Overton Park. In a letter dated November 8, 1968, the Director of the Park Commission characterized Overton Park as "the outstanding park in the city . . ." A copy of that letter is attached as Exhibit F.

21. In 1958 the firm of Harland Bartholomew & Associates made a report to the Department of Highways for the State of Tennessee entitled "Alternate Location Study Routes F.A.I. 505." That report showed alternative routes for the Project which would avoid Overton Park and avoid the use of the park land and recreation area.

22. On or about March 5, 1968, the Memphis City Council unanimously passed a resolution opposing the present location of the Project. A copy of that resolution is attached as Exhibit G.

23. On April 3, 1968, Mr. Lowell K. Bridwell, Federal Highway Administrator met in Memphis with the City Council. No member of the Citizens to Preserve Overton Park was allowed to attend the meeting. By a letter to me dated June 21, 1968, Mr. Alan Boyd, the then Secretary of Transportation, stated that Mr. Bridwell had requested that a transcript be made of the April 3, 1968 meeting. Mr. Boyd stated that a transcript was not made because the recording equipment provided by the City Council was not operative. A copy of that letter is attached as Exhibit H.

24. On April 4, 1968, the City Council passes a resolution stating, among other things, that "Overton Park is the feasible and prudent location for said route . . ." A copy of that resolution is attached as Exhibit I.

25. On May 28, 1968 Lowell K. Bridwell gave the following testimony concerning the Project to the Subcommittee on Roads of the Senate Committee on Public Works.

"We went to the city council of Memphis and we said, 'Yes, there are alternatives. We won't even give you any information on what the alternatives cost in dollars because we don't want that to be a factor in your recommendation of which line to choose. Rather, we would like you to focus upon the conflicting set of community values that are inherent in this kind of a situation.'

"We told them that a highway could be built through the area on almost any conceivable line that they could pick, that engineeringly it was feasible, that we refused to give them any information as to cost, the primary reason being that Memphis was not involved in the cost of it one way or the other, but rather to concentrate upon the conflicting set of community values that were inherent in each one of the alternatives." Hearings on Urban Highway Planning, Location, and Design Before the Subcommittee on Roads of the Senate Committee on Public Works, 90th Cong. 1st & 2nd Sess., pt. 2, p. 478.

26. One or more of these feasible alternatives are prudent alternatives.

27. The Project as approved by Defendant Volpe does not include all possible planning to minimize harm to the Park and recreation areas. In announcing Defendant Volpe's approval of the design, Mr. J. D. Braman is reported in a Department of Transportation news release as saying, "The state also has agreed to take all steps possible to minimize the harm to the park resulting from the highway." There are additional measures which the state has not agreed to take which could be taken and would minimize the harm to the park land and recreation area. One such example would be to place the Expressway in a tunnel under Overton Park.

28. On information and belief Defendant Volpe has made no finding that there is no feasible and prudent alternative to the use of such public park and recreation areas. Defendant Volpe has made no finding that the program for the Project includes all possible planning to minimize the harm to such park and recreation areas.

29. On information and belief Defendant Volpe plans to treat this approval of the Project as a contractual obligation of the Federal Government and to make expenditures to the State of Tennessee pursuant thereto.

/s/ Arlo I. Smith

November 25, 1969

[Subscription and Exhibits A-E omitted in printing]

[Exhibit F]

November 8, 1968

Mr. Frank Holloman, Director
Division of Fire & Police
City of Memphis—City Hall
125 North Main Street
Memphis, Tennessee, 38103

Re: *Fire Station No. 13—Overton Park.*

Dear Mr. Holloman:

The Memphis Park Commission in regular meeting of yesterday's date, November 7, 1968 went on record as being firmly opposed to the construction of a Fire Station in Overton Park. The Park Commission respectfully requests that some other site be selected for this Station. This is the outstanding park in the City and we have had numerous expressions of protest to this proposed taking of park land for a Fire Station site. There was a very out-spoken group present at yesterday's Board meeting protesting this action and the Park Commission was in complete agreement.

While in sympathy with the situation faced by the Fire Department in relocating this facility the Park Commission does not feel that Park land should be taken for this use.

Yours very truly,

H. S. Lewis,
Executive Director
Memphis Park Commission

HSL:vlc

c.c. Harry Woodbury, Director
Division of Public Service
Mayor Henry Loeb

[Exhibit G]**RESOLUTION RELATIVE TO EXPRESSWAY THROUGH OVERTON PARK**

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF MEMPHIS that the Department of Highways of the State of Tennessee, the Bureau of Public Roads of the Federal Government, and all other proper authorities and agencies, be advised that the Council of the City of Memphis prefers that the Expressway through Overton Park be not routed in its present proposed location but that the said proper authorities select another feasible route, with the provision that if no better route can be obtained, the route using the north perimeter of Overton Park and the South part of North Parkway Boulevard be chosen.

BE IT FURTHER RESOLVED that copies of this Resolution be sent to the said proper authorities informing them of this decision.

I hereby certify that the foregoing is a true copy and said document was adopted approved by the council of the City of Memphis in regular-special session on the Mar 5, 1968

/s/ R. E. [Illegible]
Dep. Comptroller

[Exhibit H]

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

June 21, 1968

Mr. Arlo I. Smith, Director
Citizens to Preserve Overton Park
192 Williford Street
Memphis, Tennessee 38112

Dear Mr. Smith:

I appreciate receiving your letter of April 20 and your expression of continued concern over the location of Interstate Route 40 through Overton Park as well as your feeling that the public has not been adequately informed on

how the decision was made. I also have your letter of May 25 which discusses my recent HOLIDAY Award and which relates the Overton Park problem to our actions in Baltimore and the Washington area.

Concerning your earlier letter, Mr. Bridwell has informed me of his meeting with you and others who have a great interest in the preservation of Overton Park and his telephone conversations with you.

It is unfortunate that no representative of the Citizens to Preserve Overton Park was invited to the April 3rd meeting between Mr. Bridwell and members of the City Council. As Mr. Bridwell explained on the telephone, he requested that a transcript be made of the meeting. However, when the meeting started it developed that the recording equipment provided by the City Council was not operative so there was no way to make a transcript. Had we any reason to believe that our request for a transcript would not be met, we would have arranged for a stenographer to be present to provide verbatim transcript.

At the meeting on April 3rd, Mr. Bridwell told members of the Council that the Department of Transportation had no final decision on the location of the route. Four alternatives were discussed quite thoroughly and the effects of each of the alternatives were presented in detail to members of the Council. At the outset of the meeting, Mr. Bridwell told members of the Council that he would not give any information on costs of the various alternatives nor would he answer any questions on cost because he did not want that to be a factor in the Council's consideration. He stated, instead, that any alignment of I-40 through Memphis would have disruptive effects upon established sections of the City. He explained that any alignment would bring into focus conflicting sets of community and social values and the resolution of these issues was best left to the elected representatives of the people of Memphis.

Accordingly, Mr. Bridwell used maps, aerial photographs and other graphic material to explain the effects of alignments north of the Park, south of the Park, along the north

edge of the Park and the original route proposed by the Tennessee Department of Highways. The effects of each alignment were discussed in considerable detail and members of the Council had the opportunity to ask any questions or present any points of view. The Council further was told that all of the material presented to it at the meeting would be left with members for their further study and that any additional questions they had would be answered or any additional information they wanted would be supplied.

As you are aware, the City Council voted to go ahead with the route through the Park. It is my belief that members of the Council were given a full and fair presentation of all of the facts. A representative of my office attended the meeting as an observer.

With reference to the questions in your letter of May 25, I feel that Memphis and Overton Park have received perhaps more consideration than have Baltimore and Washington. Certainly the City Council's decision to retain the Park routing did give people and their homes and their schools and churches precedence over other considerations. The causes of conservation and beauty still are being given careful study in an all-out effort to make the highway a true asset to the Memphis community.

Now that the decision has been made on the specific alignment for the route, I have asked Mr. Bridwell to develop a number of specific design alternatives in order to minimize damage to the Park and its facilities. It will be our intention to do everything we reasonably can to offset the disruptive influence of the highway.

I understand and appreciate your disappointment in this position. If there is any other way that I can be helpful to you or provide additional information, please do not hesitate to write me.

Sincerely,

/s/ Alan S. Boyd

[Exhibit 1]**RESOLUTION CONCERNING EXPRESSWAY THROUGH
OVERTON PARK**

WHEREAS, as a result of the Resolution the Council passed March 5, 1968, representatives of the Federal Government and the Department of Highways of the State of Tennessee have furnished the Council with considerable information and data to the effect that no other feasible and prudent route is available through Overton Park for Expressway I-40; and

WHEREAS, the Council has likewise been informed by the same agencies that its action to date has caused no delay in the building of this part of the expressway, but that further study and hearings could materially affect the beginning of the construction; and

WHEREAS, the Council realizes that the construction is very essential for the growth and progress of the City of Memphis.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF MEMPHIS, that the Council finds the route presently designated by the State of Tennessee and the Federal Government through Overton Park is the feasible and prudent location for said route and that the design as presently made is acceptable to the Council.

I hereby certify that the foregoing is a true copy and said document was adopted - approved by the council of the City of Memphis in regular - special session on the Apr 2, 1968.

/s/ C. W. Crutchfield
Comptroller

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

AFFIDAVIT

Edgar H. Swick, being duly sworn, deposes and says:

I am Deputy Director of the Bureau of Public Roads. In this position I have become personally familiar with the facts and circumstances of the location, design, and construction of Interstate 40 in Memphis, Tennessee.

The location of I-40 along the bus route through Overton Park was approved by the Bureau of Public Roads in 1956. All alternate alignments were rejected because of large displacements of persons, hospitals, schools, churches, and commercial establishments. For instance, the route immediately north of the park would have involved the taking of three schools, including Southwestern University and the largest high school in Memphis, plus churches attended by 4,000 people, industries, and the residences of more than 1,500 people. The route south of the park would have involved taking two schools, three churches attended by 7,500 people, 46 commercial establishments, residential units being occupied by over 3,000 persons and a hospital and home for the aged. Incidentally, the construction and right-of-way costs of the least expensive of these alternate routes would exceed the costs of the chosen route by many millions of dollars.

The 1956 determination that the only feasible and prudent location for the highway was on the present bus route through the park was reaffirmed by Federal Highway Administrator Whitton in 1966 [Exhibit A], Federal Highway Administrator Bridwell and Secretary of Transportation Boyd in 1968 [Exhibit B], and Federal Highway Administrator Turner and Secretary of Transportation Volpe in 1969 [Exhibit C]. As indicated in the hearing of the Subcommittee on Roads of the Senate Public Works,

90th Congress, 1st and 2d Sessions, pages 478-480, the City Council of Memphis determined that this was the only feasible and prudent location for the highway even without considering the cost of any possible location. On April 2, 1968, it passed a resolution approving this route. The plaintiffs do not name any other route as feasible and prudent.

Further, most of the right-of-way has been acquired and cleared on this project adjacent to the park. Such acquisition was authorized in May 1967. In the areas immediately east and west of the park, between where any alternate location for the road would leave the presently projected route until it would remerge with this projected route so as to avoid the park, all the right of way has been acquired, ninety-nine percent of the approximately 2,200 people formerly living there have been displaced, and seventy-five percent of the buildings demolished. A change of route at this time would require additional hardship, dislocations of people in areas paralleling the portions of the route already cleared, as well as the hardship dislocation of people along the portion of any new route out of the park.

The design of I-40 through the park is as compatible with park surroundings as possible. The possibility of tunnelling under the park was studied. However, in order to avoid damage to the tree roots, a bored tunnel would have to be placed 20 feet below the nature ground. This would cost an estimated \$107 million and involve overcoming difficult and risky construction problems in constructing this tunnel through water-bearing, loess-type soils. A cut and cover tunnel was also rejected as a possible alternative. Such a tunnel would not have preserved the existing park vegetation as it would have to be removed in order to proceed with the construction process. The cost of a cut and cover tunnel is estimated to be \$41.5 million [see Exhibit D].

Air pollution with either scheme would be concentrated near the ventilation shafts within the park. Freeway users would also be subject to an unpleasant tunnel atmosphere

in contrast with a surface road or a depressed road through the park. Tunnel construction of major highways also involves danger to the public safety as emergency vehicles have difficulty in the removal of stalled or wrecked vehicles in assisting in accidents involving fire in the tunnel. For these reasons, the concept of tunnelling through the park was not acceptable.

The proposed design, estimated to cost about \$3.5 million, is along an existing bus route through the park. The highway grade line has been depressed as much as is reasonably possible from an engineering standpoint. With the exception of the crossing of Lick Creek, the grade line is depressed so that traffic is essentially hidden from the park users' view. Lick Creek is the natural drainage facility to the Mississippi River in this section of Memphis. To maintain a grade line lower than Lick Creek would require an inverted syphon to carry the stream and would necessitate the pumping of highway drainage. Historically, areas where pumping is required in the City of Memphis have been subject to flooding at times of power failure, which is more prone to happen during severe storms when the pumping is essential. Further, the use of an inverted syphon under the highway would require an open pool creating a malarial hazard and danger to human and animal life.

The largely depressed and hidden highway planned takes but 26 of the 342 acres of the park. The highway is designed to be constructed near the northern boundary of the park, along an existing bus route, so as not to unduly harm the remainder of the park. With the exception of a portion of the parking lot for the zoo, none of the park features are being taken or changed in their use. The width of the highway cross-section has been minimized by the use of architecturally designed retaining walls so as to reduce the width of the highway. A 40-foot wide grass-covered median is proposed for both safety and aesthetic reasons. Elimination of such a median would provide substantial danger to the public and detract from the visual appearance

of the highway in the park. In addition, normal drainage ditches have been eliminated to reduce the total width of the highway. The entire highway will be landscaped in a manner consistent with the landscaping of the park.

The \$2.2 million to be paid to the City of Memphis by the State for the 26 acres near the northern boundary of the park has been specifically allocated by the City for 300 acres of new parkland and improvements to the zoo. One million dollars is committed for a single 160-acre city park, one million dollars for separate local park tracts totalling 140 acres, and the remaining \$200,000 for improvements to the zoo in Overton Park. [See Exhibit D.]

Further, the Secretary of Transportation, in approving this project has particularly required that maximum planning be done to minimize harm to the park [Exhibit C]. The features of this plan include, among others:

- Depression of the roadway to the maximum extent possible consistent with the requirements of drainage and possible safety in the area.

- A pedestrian crossing over the highway in the area of the zoo with a lower crown and a broad, natural-looking aspect that blends with the surroundings and provides for a visual continuity.

- Exploration of other pedestrian crossings.

- Continual study of beautifying the parkway to conform with landscaping to architectural renderings reviewed by the Secretary of Transportation.

The State has agreed to this planning to minimize harm to the park.

With the exception of a seven-mile gap in I-40 in downtown Memphis, including Overton Park, this Interstate highway is open to traffic or nearing completion between Nashville, Tennessee, and Little Rock, Arkansas.

This agency has examined the May 19, 1969, hearings conducted by the State of Tennessee and determined that

the hearings met the requirements of statute and regulation. The only alleged flaws in these hearings, pointed to in the complaint, involve the failure of the State to make and submit a full verbatim transcript as allegedly set out in paragraph 8.c(1) of Bureau of Public Roads' Policy and Procedure Memorandum (PPM) 20-8, and the failure to publish notice of provisions for the submission of written statements and other exhibits as set out in paragraph 8.b(2) of that Memorandum.

In regard to the requirements of paragraph 8.c(1) of the PPM, the State did literally "provide for the making of a verbatim written transcript of the oral proceedings . . ." It further did "submit a copy of the transcript to the division engineer." The State acknowledged to the defendant that although it made provision for a verbatim transcript, it did not obtain a full transcript because unknown to it during the hearing, the recording equipment failed. This agency then requested the State to contact all speakers whose statements they knew were not recorded, and to ask these speakers for written statements. The State subsequently advised us that they followed this course. The State did receive or solicit statements from each of the persons claimed at page 9 of the plaintiffs' brief to be the most important who testified: Mrs. Watkins Overton, Forrest V. Durand and Harry W. Rice of the Department of the Interior, Ben H. Thompson of the National Recreation and Park Association, and Arlo Smith of the Citizens to Preserve Overton Park [Exhibit E]. Mr. Thompson's statement was attached to the original hearing transcript [Exhibit F]. As the State of Tennessee had made provision for a verbatim transcript, had given us as complete a transcript as existed, and had solicited statements from those who spoke at the hearing without being recorded, it was concluded that Tennessee had followed the letter and spirit of paragraph 8.c(1) of our requirements. To date there has been no claim that any argument on design was not before the State and Federal Governments because of the failure of the recording equipment. It should be noted

that the National Park and Recreation Association, although opposed to the highway, particularly commend the State to us for the way it conducted the hearing [Exhibit F].

Further, responsible State highway officials did attend and conduct this design hearing. They included Harry K. Buckner, Jr., attorney for the Tennessee Department of Highways, and R. L. Iddins, Jr., the Assistant Design Engineer for that Department. Mr. Iddins was familiar with the location and represented the State as to both location and design at this hearing. In our view it was not necessary for a location engineer to attend this hearing.

In regard to the provisions of paragraph 8.b(2) we also concluded that the State complied with the memorandum. We do not view any failure to publish notice concerning the submission of written statements to require the vitiation of a hearing held and attended by hundreds of people. The affidavit annexed to the motion for a preliminary judgment itself indicates that any failure to give notice that written statements might be filed was technical and not substantive. It states that at least thirteen written statements were filed. Actually over 40 written statements were submitted. Further, there has been no claim to date that any matter concerning design, or even location, was not before the State or this Department because of this failure to publicize the solicitation of written statements. In this context, we have determined that the State complied with our regulations in the conduct of the design hearing.

This agency has further been informed by the State of Tennessee that construction on this route could not begin before February 1, 1970, and probably not before March 1, 1970.

/s/ Edgar H. Swick

[Subscription omitted in printing]

[EXHIBIT A]

**ATTACHMENT TO AFFIDAVIT OF
EDGAR H. SWICK**

[Filed 2/18/70,
No. 7 on Clerk's Certificate]

**U.S. DEPARTMENT OF COMMERCE
BUREAU OF PUBLIC ROADS
REGION THREE
Room No. 414
226 Capitol Blvd. Bldg
Nashville, Tennessee 37219**

[Received Dec. 14, 1970]

January 27, 1966

Mr. Warner E. Dunlap
State Highway Engineer
State Highway Department
Nashville, Tennessee

Subject: Tennessee - I-40 Location Through Overton
Park in Memphis - Project I-40-1 (68)3 - Mr.
Whitton's Letter to Commissioner Pack
dated January 27, 1966

Dear Mr. Dunlap:

Mr. Whitton's letter of January 17, 1966, which I handed to Commissioner Pack on January 24, 1966, reaffirms our previous approval of your Department's selection of a location through Overton Park for a segment of I-40 in the City of Memphis.

You and I have today discussed the conditions to Mr. Whitton's action listed in the last paragraph of his letter, a copy of which is attached for your ready reference.

I will appreciate your advice as to the steps being taken by your Department to satisfy the conditions regarding the continuous evaluation of the design by qualified architect-

tural landscape personnel and the coordination of the aesthetic elements with the appropriate city officials.

Very truly yours,

/s/ J. C. Cobb
Division Engineer

Attachment

cc: Mr. L. W. Keeler

[Received Jan. 17, 1966]

39-30

Mr. David M. Pack, Commissioner
Tennessee Department of Highways
State Highway Department Building
Corner 6th Avenue, North and
Deaderick Street
Nashville, Tennessee 37219

THROUGH:
Mr. Harry E. Stark
Regional Engineer

Mr. J. C. Cobb
Division Engineer

Dear Mr. Pack:

Thank you for your August 23, 1965, letter concerning your reevaluation of the location of Interstate Route 40 in the vicinity of Overton Park at Memphis. I appreciate the thorough manner with which your department has approached this problem. It is a matter which fully deserves the most careful and serious consideration.

Since receiving your letter I have had our staff here and in our Atlanta and Nashville offices again make a thorough and deliberate review of the whole situation, which has now been completed. I have gone over with them their findings as well as reviewed the material made available by you and others. I have also made myself and our staff available to meet with anyone who has expressed an interest and we

have met with a number of people to receive their views and discuss the matter.

We find that the Tennessee Department of Highways has given adequate study and developed sufficient information to properly define the problem and on which to base a decision. We find nothing pertinent to this matter which you have not taken into consideration. Your conclusion that the location through the northern part of Overton Park represents the proper balance of the various factors involved in this area is well founded. We can offer no objections to your decision and reaffirm our previous approval of this location.

I have noted with special interest your remarks concerning the design of the highway through the Park area, particularly the aesthetic aspects. I strongly indorse the most exacting efforts to assure a finished product which is in keeping with the area and future Park usage. We consider this to be absolutely essential and for added emphasis make it a condition to our action. We ask that the design be subjected to continuous evaluation by qualified architectural landscape personnel as it progresses. The aesthetic elements should be fully coordinated with the appropriate city park officials so that a mutually acceptable plan is achieved.

Sincerely yours,

/s/ Rex M. Whitton
Federal Highway Administrator

cc: Mr. Harry E. Stark
Mr. J. C. Cobb

[EXHIBIT B]

FEDERAL HIGHWAY ADMINISTRATION
Washington, D.C. 20591

FHWA-153

FOR RELEASE AT 11 A.M.
FRIDAY, APRIL 19, 1968

*DOT APPROVES I-40 ROUTE
FOR MEMPHIS OVERTON PARK*

The Department of Transportation today reconfirmed Federal approval of a proposal to route Interstate 40 through Overton Park in Memphis, Tennessee.

Federal Highway Administrator Lowell K. Bridwell said the action follows an April 5 resolution by the Memphis City Council which found the park route "feasible and prudent," thus ending years of dispute over the location.

Bridwell said today's decision affects only the location of the route. "In the actual design stage," he said "we will try to minimize as much as possible the impact of the highways on the park facility."

The location of the highway through Overton Park was first approved August 2, 1947. Bureau of Public Roads records show its approval was reaffirmed on January 17, 1966. The Memphis City Council, a month before its April 5 resolution, had voted against the park route. Much of the right-of-way leading up to the park already has been purchased.

[EXHIBIT C]

DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
Washington, D.C. 20590

FOR RELEASE WEDNESDAY A.M.
November 5, 1969

DOT-24069
Phone: (202) 963-5154

Secretary of Transportation John A. Volpe today announced he has approved, with significant qualifications, a proposal submitted by the Tennessee Department of Highways to construct a segment of Interstate Route 40 through Overton Park in Memphis, Tennessee.

Secretary Volpe said a "hold" on the project had been lifted after the state agreed to adjust the grade line of the depressed freeway to a point as low as possible. This grade line would still permit natural drainage in the area of Lick Creek, a small stream that flows through the 360 acre park near downtown Memphis.

J. D. Braman, Assistant Secretary of Transportation for Environment and Urban Systems, and one of Secretary Volpe's key advisors on environment and downtown highway systems, said, "The plan for Overton Park is the most reasonable now open to us and is designed to do minimum damage to the park. The options of this Administration were few, mainly because the route of the highway had previously been determined."

Secretary Volpe established the Office of Environment and Urban Systems soon after taking office on January 21 to advise him on environmental problems and to act as an intra-governmental liaison unit.

Braman said that in addition to depressing the highway, the state had agreed to build suitable pedestrian ways across the freeway to provide access to the zoo and portions of the park north of the freeway. Design of the aesthetic features are subject to Secretary Volpe's review, he added.

"The state also has agreed to take all steps possible to minimize the harm to the park resulting from the highway," Braman said.

Secretary Volpe's action clears the way for the state to pay the City of Memphis more than \$2 million to be used to replace the parklands lost to the freeway and for other improvements.

Secretary Volpe said he understood that some of the money is to be used to improve the Overton Park zoo and that an old golf course will be converted into a park.

Interstate 40 is a trans-continental freeway stretching about 2,348 miles from California through Arizona, New Mexico, Texas, Oklahoma, Arkansas, Tennessee, and North Carolina.

The location of the highway through Overton Park was first approved as part of the Memphis Highway System on August 2, 1947. Department of Transportation records show this approval was reaffirmed on January 17, 1967, and again on April 19, 1968 when the highway was incorporated into the Interstate System.

* * *

[EXHIBIT D]

Oct. 14, 1969

Mr. John A. Volpe, Secretary
Department of Transportation

34-30

F. C. Turner
by E. H. Swick

INFORMATION—Tennessee I-40 through Overton Park,
Memphis, Tennessee

Enclosed is a brief report of the subject project for your
information.

Enclosure

Bureau of Public Roads
MIEspeland/JJKessler:msk
(10-14-69)

cc: Files (2)

Mr. R. R. Bartelsmeyer

Mr. E. H. Swick

Mr. G. M. Williams,

Director, Office of

Eng. & Operations

CC Unit

Systems & Location

Division

Reader File - 812

Copies to:

FHWA Executive Secretariat (2)

DOT Executive Secretariat (3)

S-2

S-10

Signer

BPR File (RETURN TO
PUBLIC ROADS)

October 14, 1969

Tennessee I-40 through Overton Park,
Memphis, Tennessee

The Bureau of Public Roads originally approved the location of Interstate 40 through Overton Park in 1956. Studies of alternate alignments, now totaling greater than 20 in number, have continued to support this decision. The reason—alternate alignments around the park are infeasible because of the severe disruption this would cause to

the community through displacement of large numbers of people, businesses, schools and hospitals, in addition to causing severe traffic disruption to local streets. This decision has subsequently been reaffirmed by former Federal Highway Administrator Whitton in 1966 and again by former Administrator Bridwell and former Secretary of Transportation Boyd in 1968. Local officials also support the approved location.

The design of I-40 through the park has been given careful consideration in order to provide a highway that is fully compatible with the park surroundings. The possibility of tunneling under the park was carefully studied. In order not to damage tree roots, a bored tunnel would have to be placed some 20 feet below natural ground. The State estimated the construction costs for the bored tunnel to be approximately \$107 million and foresaw tremendous construction problems in having to bore through water-bearing, loess-type soils. This concept was considered as not being reasonably productive of benefits equal to the cost nor a prudent expenditure of public funds. A cut-and-cover tunnel, estimated to cost approximately \$41.5 million, was considered as a possible alternative. But such a tunnel would do little in the way of park preservation, since the natural existing vegetation would have to be removed in the construction process. Air pollution with either scheme would be concentrated at the ventilation shafts within the park. Freeway users would be subjected to an unpleasant tunnel atmosphere as well as to considerable hazard. Emergency vehicles would have difficulty reaching stalled or wrecked vehicles, and accidents involving fire would imperil all within the tunnel. For these reasons, the concept of tunneling under the park was abandoned.

The proposed design, estimated to cost about \$3.5 million, follows along an existing bus route through the park. The highway grade line has been depressed as much as reasonably possible. With the exception of crossing over Lick Creek, the grade line is depressed such that traffic is essentially hidden from the view of the park user. To

maintain a grade line lower than Lick Creek would require an inverted siphon to carry the stream and would necessitate the pumping of highway drainage. The city is adamantly opposed to this concept. Their contention is that should drainage be pumped, power failures would cause flooding which has already occurred at a similar installation elsewhere in Memphis. The city is also opposed to an inverted siphon because of its unusual maintenance problems, together with its hazard to human and animal life, and of possible health hazard and nuisance due to stagnant water.

The highway is taking less than 10 percent of the parkland, and with the exception of a portion of the zoo's parking lot, none of the park features are being taken or changed in their use. The width of the roadway cross-section has been minimized by the use of retaining walls, architecturally designed, to reduce the horizontal dimension of the highway. Although a 40-foot wide grass median is proposed for both safety and esthetic reasons, normal side ditches have been eliminated in favor of an underground drainage system in an effort to reduce the total width of the highway. The entire roadway will be fully landscaped in conformity with the park area.

With the exception of approximately a seven-mile gap, I-40 is now either open to traffic or nearing completion between Little Rock, Arkansas and Nashville, Tennessee. The gap referred to is in downtown Memphis and includes the section through Overton Park. The State has recognized the desirability of completing this last section of I-40. They have held the necessary public hearings, acquired and cleared most of the right-of-way on both sides of the park, and had planned to let a construction contract for a section immediately adjacent to the park this fall. The city and State have come to an agreement on the purchase of the parkland, and specific allocation of the proceeds for purchase of new parklands already has been made by the city. Of the \$2.2 million to be paid, \$1.0 million is committed to a 160-acre single new park, \$1.0 million is ear-

marked for several separate park tracts aggregating 140 acres, and \$0.2 million will be spent for zoo improvements in Overton Park itself. In essence, 26 acres of Overton Park is being replaced by about 300 acres of new Memphis parks.

Until a decision is reached in the Office of the Secretary regarding the design of I-40 through Overton Park, further negotiations with the city, as well as further advancement of all projects within the seven-mile gap, is being held in abeyance.

[EXHIBIT E]

STATE OF TENNESSEE
DEPARTMENT OF HIGHWAYS
Nashville 37219

September 3, 1969

Contract No. 0014
Project I-40-1(90)3
I-40 from McLean to Maris
Shelby County

Mr. John S. Logan, Jr.
Bureau of Public Roads
Nashville, Tennessee

Dear Mr. Logan:

We are enclosing herewith three copies of a letter, dated September 2, 1969, from Mr. L. W. Keeler to the writer, and three copies each of the two letters referred to by Mr. Keeler. All of this correspondence has to do with the statements made by individuals during the period of the missing tape record of the design public hearing.

You will note that Mr. Keeler states that the Department has reviewed the supplemental information received in connection with the missing portion of the tape, and that no

changes are recommended in the proposed design. Please make this letter and the attached correspondence a supplement to the Design Study Report.

It is hoped that with this submission you will be able to furnish the Department at a very early date your approval of the proposed design for the project.

Yours very truly,

/s/ Robert C. Odle
Design Engineer

RCO:eb

Encl.

cc: Mr. H. D. Long
Mr. L. W. Keeler

STATE OF TENNESSEE
DEPARTMENT OF HIGHWAYS
Nashville 37219

September 2, 1969

Mr. R. C. Odle
Design Engineer
Department of Highways
Nashville, Tennessee

Dear Mr. Odle:

Subject: Project I-40-1 (90)3, Shelby County - Section
Through Overton Park, Design Public Hearing

Reference is made to my letter to you, dated June 5, 1969, in which I commented on the design public hearing for the subject highway and concluded that the comments in the hearing had not raised any issues which merited any change in the proposed design. As you know, the public hearing transcript failed to record statements of certain persons in attendance at the meeting. Our Department Attorney has followed up in accordance with discussions

with the Bureau of Public Roads to provide an opportunity for statements in the record by any persons attending the design public hearing, and who made statements which were not recorded in the transcript. I am enclosing herewith copies of 2 letters as follows: Dated July 22, 1969, from Mr. Forrest V. Durand; and August 29, 1969, from Mr. Henry K. Buckner, Jr., to Mr. John S. Logan, Jr. Mr. Buckner's letter states that, although he had given opportunity to Mrs. Watkins Overton for a written statement, none had been offered. Mr. Buckner further advised that these two letters provide the final public hearing public comments to be made a part of the public hearing record.

This supplemental information has been reviewed and it is not considered that any changes from our proposed design should be made, as no new information was presented and no recommendations made which are considered meritorious. It is hoped that with this submission the Bureau of Public Roads can now provide formal approval of our proposed design.

Yours sincerely,

/s/ L. W. Keeler
Development Engineer

LWK:hf

Enclosures

cc: Com. C. W. Speight; Mr. H. D. Long;
Mr. C. S. Harmon; Mr. Henry K. Buckner,
Jr.; Mr. E. R. Terrell; Mr. J. K. Bilbrey

August 29, 1969

Mr. John S. Logan, Jr.
Bureau of Public Roads
226 Capitol Boulevard Building
Nashville, Tennessee 37219

Dear Mr. Logan:

Re: Shelby County
I-40-1(90)3, 79002-2109-44
McLean & Collins Street

This is to certify that Mrs. Watkins Overton, one of the participants whose statements was not recorded during the public hearing conducted on May 19, 1969, with respect to captioned matter, has through silence declined our offer to provide a written statement which reflects her views concerning this matter in accordance with the directive of Mr. Swick.

There are no other persons eligible to provide the written statement set forth in Mr. Swick's directive.

Very truly yours,

/s/ Henry K. Buckner, Jr.
Department Attorney

HKBJ:amh

Bc: Mr. L. W. Keeler

BUREAU OF OUTDOOR RECREATION
SOUTHEAST REGIONAL OFFICE

810 New Walton Building
Atlanta, Georgia 30303

July 22, 1969

Mr. Charles W. Speight
Commissioner
Department of Highways
State of Tennessee
Nashville, Tennessee 37219

Dear Mr. Speight:

Mr. Charles E. Elkins, Jr., in his July 16, 1969 letter concerning Project No. I-40-1 (90)3, Shelby County, Design Public Hearing, stated that approximately one hour of the hearing's tape record was lost. He invited me to reduce the statement which I made to writing and submit it to him.

The statement I made was entirely from notes. While I cannot give a verbatim record, essentially what I said was as follows:

1. Regardless of what type of surface design is followed there won't be much in the way of a wooded park left in Overton Park after an interstate highway is routed through it.
2. Every possible consideration is recommended for a tunnel design which will leave the Park's surface wooded landscape undisturbed.
3. Consideration should be given to eliminating an access route to I-40 indicated by one of the maps displayed as being in the northwest wooded area of the Park.
4. Some mention was made by persons speaking at the hearing of conflicts between planned highways and other Memphis public park areas. I pointed out that the Secretary of the Interior had the responsibility

and prerogative of commenting on such possible conflicts where Federal funds were involved.

Sincerely yours,

/s/ Forrest V. Durand
Assistant Regional Director

August 6, 1969

Mr. John S. Logan, Jr.
Bureau of Public Roads
226 Capitol Blvd. Bldg.
Nashville, Tennessee 37219

Dear Mr. Logan:

Reference is made to my letter of July 31, 1969 concerning the public hearing on Overton Park in Memphis, Tennessee.

Today I have received the enclosed letter from Dr. Arlo I. Smith, Chairman, Citizens to Preserve Overton Park. Although Dr. Smith's letter was not mailed within the 10-day period I feel that due to the circumstances involved it should also be made a part of the public hearing, so I hereby submit it to you.

Yours very truly,

/s/ Clarence E. Elkins, Jr.
Staff Attorney

CEE:al
Enclosure

OVERTON PARK ROUTING OF INTERSTATE 40.

In Compliance with opportunity to reduce oral testimony not recorded in the last hour of the Public Hearing in City Hall.

Statement of Arlo I. Smith, Chairman
Citizens To Preserve Overton Park,
who spoke briefly at the close
of the hearing testimony

In addition to re-emphasizing the *summary* which was given at the close of the main presentation of the Citizens To Preserve Overton Park—main presentation by Mrs. Stoner; the summary by Dr. Arlo I. Smith (see statement following page 11 of written testimony)—the following requests were made:

1. Data on alternate routes considered before the park location was chosen—
 - a) dates the routes were studied and rejected
 - b) report on reason for rejecting the alternates
2. Who were the people consulted *outside* the field of engineering when Overton Park was being considered as a location for I-40?
 - b) What authorities from other fields were consulted? Such as, conservationists, demographers, ecologists, educators, health authorities, park and recreation leaders, sociologists?
 - c) Was the Tennessee State Conservation Department and the Tennessee Naturalist consulted?
Was the Tennessee Commission on Wildlife consulted?
Was the Tennessee Commission on Historic Preservation consulted?
 - d) Was the U.S. Department of the Interior consulted; if so, who in the Department and the date?

Answers to these questions are asked within ten days (10) of May 19, 1969, answers to be sent to Citizens To Preserve Overton Park, Memphis, Tennessee.

/s/ Arlo I. Smith
Chairman

August 2, 1969

August 1, 1969

Mr. John S. Logan, Jr.
Bureau of Public Roads
226 Capitol Blvd. Bldg.
Nashville, Tennessee 37219

Dear Mr. Logan:

Reference is made to my letter of July 31, 1969 concerning the public hearing on Overton Park in Memphis, Tennessee.

Today I have received the enclosed letter from Mr. Harry W. Rice, Assistant Director, U.S. Department of the Interior, Bureau of Outdoor Recreation. Although Mr. Rice's letter was not mailed within the 10-day period I feel that due to the circumstances involved it should also be made a part of the public hearing, so I hereby submit it to you.

Yours very truly,

/s/ Clarence E. Elkins, Jr.
Staff Attorney

CEE:al
Enclosure

U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF OUTDOOR RECREATION
Washington, D.C. 20240

July 28, 1969

Mr. Clarence E. Elkins, Jr.
Staff Attorney
Department of Highways
State of Tennessee
Nashville, Tennessee 37219

Dear Mr. Elkins:

I appreciate receiving your letter of July 16, providing me an opportunity to submit a resume of my comments made on May 19, in Memphis, regarding the proposed expressway through Overton Park.

I do not recall all of my specific comments, but I do recall that I had expressed concern over the proposed design of the expressway, which would impair the usefulness of the park by separating it into two parts. I pointed out that throughout the Country needs are increasing for more park and recreation areas to meet mounting population increases and that Memphis has a special asset in Overton Park because of its size and location within the city limits. I also urged that the Department of Highways not let cost be the sole criterion in developing designs for this expressway. Once the park has been separated by the expressway its values have been seriously impaired; whereas, a tunnel or a depressed expressway with appropriate cover would allow the park to be used to its greatest extent. I hope that serious consideration will be given to depressing this roadway fully with appropriate lids or that it may be possible to route the expressway through a tunnel.

There seems to be an increase in the number of park-highway conflicts throughout the Nation, and I expressed the view that I would hope the engineers for the Department of Highways of the State of Tennessee could develop a

facility that other parts of the Country could refer to as a model.

Sincerely yours,

/s/ Harry W. Rice
Assistant Director

July 31, 1969

Mr. John S. Logan, Jr.
Bureau of Public Roads
226 Capitol Blvd. Bldg.
Nashville, Tennessee 37219

Re: Project No. I-40-1 (90)3
Shelby County, Tennessee
Public Hearing

Dear Mr. Logan:

Reference is made to your letter of July 11, 1969 to Comm. Speight concerning that part of the transcript of the above captioned public hearing which was defective.

Please find enclosed a Certification as requested by your letter. I hope that this is satisfactory.

Very truly yours,

/s/ Clarence E. Elkins, Jr.
Staff Attorney

CEE:al

Enclosures

cc: Comm. C. W. Speight
Mr. H. D. Long
Mr. L. W. Keeler

CERTIFICATION TO SECRETARY
DEPARTMENT OF TRANSPORTATION

In Accordance with Section 128, Title 23,
United States Code Annotated

This is to certify that in accordance with the letter of Mr. John S. Logan, Jr., Division Engineer, of July 11, 1969 concerning Project No. I-40-1(90)3, Design Public Hearing, Shelby County, Tennessee. I have notified in writing all persons whose statements were not recorded during the hearing and have given them the opportunity to reduce their statements to writing within a 10-day period. Those people so notified were: Mrs. William Dupree, Mrs. Anona Stoner, Dr. Arlo I. Smith, Mr. Forrest Duvant and Mr. Harry Rice.

I hereby certify that the 10-day period has passed and the enclosed is the only statement that I have received.

/s/ Clarence E. Elkins, Jr.
Staff Attorney

July 31, 1969

cc: Mr. L. W. Keeler

[EXHIBIT F]

NATIONAL RECREATION AND PARK ASSOCIATION

May 22, 1969

The Honorable James D. Braman
Assistant Secretary
Urban Systems and Environment
Department of Transportation
800 Independence Avenue, S.W.
Washington, D.C.

Dear Mr. Braman:

Enclosed is a copy of the statement by Mr. Thompson for the National Recreation and Park Association at the Design hearing on I-40, Overton Park section, at Memphis, Tennessee, Monday, May 19. We commend the Tennessee State Highway Department for the manner in which the hearing was conducted. Mr. Buckner, the presiding officer, was patient, fair and responsive. It was a good hearing and all who attended it received useful information.

Residents of Memphis who urged greater protection of the Park, strongly recommended that the highway be placed under the Park in a tunnel. We agree that that would be the best possible way to design the freeway, if it must cross Overton Park.

We are still greatly concerned about the inadequacy of the highway design which was presented by the State at the Monday hearing.

The design presented would depress the highway 10 feet or more below the ground level for some 1800 feet through the eastern portion of Overton Park. Westerly, for the next 2300 feet to the western edge of the Park, the highway would be depressed varying amounts but less than 10 feet below ground surface and, in the vicinity of Lick Creek and for several hundred feet each side of the Creek, the highway would be on a fill ranging from ground surface to as

much as 6 feet above ground. Truck traffic would obviously be visible through this 2300-foot western portion of the Park.

While we do not profess to be engineers, we are still of the opinion that not enough consideration has been given to the possibilities of (a) carrying Lick Creek over I-40 in an aqueduct, or (b) depressing Lick Creek under I-40 in an inverted siphon, or (c) diverting Lick Creek westward almost to the McClean Street edge of the Park where ground surface is somewhat higher than it is at the present location of Lick Creek, which would give a little more leeway for depressing the Creek under the highway, then conducting it northward to a junction with its present course north of the Park.

From the park protection point of view, the advantage of any one of the three suggested alternatives would be to make possible the depression of the highway sufficiently throughout the Park section to keep truck traffic out of sight.

Mr. R. G. James, Geometric Design Engineer of the Bureau of Public Roads, in his report of April 29, 1968 was concerned about possible difficulties that might be encountered from ground water if the highway profile was depressed more than indicated in his alternate profile suggestions. Later test drillings, however, indicated that the ground water level was some 11 feet lower than he had assumed it to be. That should permit depressing the highway further than he suggested and further than the profile shown at the May 19 hearing.

The other factor that still concerns us very much is that there was no apparent inclination on the part of the highway officials to reduce the width of the highway right-of-way through the Park. The plan presented at the hearing still shows a 40 foot median strip and broad sloping areas on both sides of the highway for grass and other landscaping. In brief, the plan presented still shows the high-

way right-of-way through the Park as 425 feet wide at the eastern edge of the Park, 250 wide near the Park overpass and some 200 feet wide at Lick Creek. This will obliterate an enormous swath of superb oak-hickory forest through much of the Park.

I write to you to urge the Department of Transportation to require more serious exploration of the alternative possibilities of (a) depressing the freeway sufficiently throughout its entire crossing of the Park and (b) that the right-of-way be narrowed to the minimum required for highway safety.

Sincerely,

/s/ Sal J. Prezioso
President

SJP:BHT

Enclosure

MEMPHIS, TENNESSEE, May 19, 1969

I am Ben H. Thompson, legislative assistant on the staff of the National Recreation and Park Association. I am here to represent Dr. Sal J. Prezioso, President, National Recreation and Park Association with headquarters at 1700 Pennsylvania Avenue, N.W., Washington, D.C. The Association is a private, nonprofit educational and service organization dedicated to the wise use of free time, conservation of natural resources, and beautification of the American environment.

It is our understanding that the purpose of this hearing is to consider the design of the projected highway. The corridor or route of the highway, cutting across Overton Park, has already been approved by the Department of Transportation.

It is the view of the National Recreation and Park Association that routing Interstate 40 through the Park, with six

traffic lanes designed for speeds up to 60 miles an hour, is a tragic mistake. The sound, sight, and fumes of motor traffic, including trucks and buses, will impinge upon the present character of this quiet midcity park in a very damaging manner. We have opposed routing the highway across the Park and we still oppose it. We are opposed to all such needless and heavy handed encroachments upon irreplaceable park lands.

Since the Department of Transportation made its decision on the park route, our efforts have been aimed at doing everything possible to persuade highway officials to design the highway through the park in such a manner as to minimize its damaging impact on park values.

The gist of our repeated recommendations has been that (1) the highway should be depressed sufficiently to eliminate the sight of fast moving traffic through the Park, reduce the sound, reduce the height and length of the park road overpass connecting the severed parts of the Park, reduce the height of the pedestrian overpass to the zoo and that (2) the highway right-of-way through the Park should be narrowed to the minimum consistent with traffic safety, making it possible thereby to keep as needed park land half or nearly half of the presently proposed 250-foot wide highway right-of-way.

We realize that the City, State, and Federal highway agencies have made studies of alternate highway profiles through the Park, considering different depths of depression of the highway below the park land surface. The lowest control point in each of the alternative road profiles studied is determined by the theoretical 50-year flood elevation of Lick Creek, which is estimated to be at ground level elevation 251 feet above sea level.

The highway profile which we understand that the City, State and Federal highway agencies find acceptable, would depress the highway 10 feet or more below the ground level for some 1800 feet through the eastern portion of Overton Park. Westerly, for the next 2300 feet to the western edge of the park, the highway would be depressed varying amounts but less than 10 feet below ground surface and, in the vicinity of Lick Creek and for several hundred feet

each side of the Creek, the highway would be on a fill ranging from ground surface to as much as 6 feet above ground. Truck traffic would obviously be visible through this 2300-foot western portion of the park.

[Illegible] the several highway profiles studied, Alternate Profile Number 2 would do less damage to park values, because it would, for the most part, be depressed several feet below the line which the highway agencies find most acceptable.

Alternate Profile Number 2 involves shallower and wider box culverts to conduct Lick Creek under the highway and assumes downstream improvements recommended for Lick Creek. The highway profile where it crosses Lick Creek would be at elevation 252 feet above sea level which is about 2 feet above the ground surface at that point in the park.

Even that alternative, which has not been accepted by the highway agencies, would bring the traffic to the surface close to the zoo and close to heavy use areas of the Park. If there is no better alternative, then we would recommend approval of Alternate Profile Number 2.

If Lick Creek could be carried over the highway or if the Creek could be depressed sufficiently, the highway profile likewise could be depressed throughout the Park, keeping traffic out of sight from important use areas in the Park and reducing its damaging impact.

We do not know whether serious study has been given to either of these possibilities and their cost. If such study has not been made, we believe that it should be made in the immediate future. The study need not require prolonged or unreasonable delay.

Assuming that it is feasible from the engineering angle to carry Lick Creek over the highway or to depress the Creek under the highway, the question of costs immediately arises. Lacking the results of such a study, we do not have that information.

[Illegible] the damaging impact of a major highway invasion of the Park must be evaluated in relation to the social

and cultural value that the Park in its particular location offers to the people of Memphis. Such values are timeless and cannot be adequately expressed in dollars and cents; they cannot be expressed in terms of the dollars it would take to buy an equal amount of land some place else. The ~~great~~ value of a midcity park, such as Overton, is in its character and its location. If its values are gradually dissipated by repeated encroachments its social and cultural utility will be reduced and impaired for all time. Even if it should cost up to several million dollars more to reduce significantly the damaging impact of I-40 on Overton Park, we would hold that such additional cost is good and sound investment in the protection and preservation of the timeless values of the Park and in the enduring character of Memphis as a desirable place to live.

It is highly unlikely that 25 years from now anyone will be seriously concerned about the cost of ameliorating the damaging impact of the interstate highway on Overton Park. But the severing of the Park and the intrusion of noisy freeway truck, bus, and car traffic into the previously quiet atmosphere of the Park will be the reality that people using the Park will live with, night and day, for as long as the interstate highway is used.

Considering, now, the proposed right-of-way, land that is to be taken out of park use and devoted to freeway use, the proposed right-of-way is 425 feet wide at the east side of the Park; it is still 250 feet wide most of this distance, the highway will traverse and obliterate a wide swath of magnificent park forest. Every foot of park land that can be preserved by narrowing the highway right-of-way should be preserved.

The major consideration, we hold, in determining the width of the highway right-of-way through the Park, should be directly related to highway traffic safety. Cutting down old park forest trees merely to provide space for freeway landscaping is, in our opinion, highly questionable. The whole Park was set aside for its landscape, scenic and other cultural values. If the freeway must go through it, it should do so as unobtrusively as possible. We should not destroy

park values to try to make the freeway invasion look more attractive.

If, for instance, a 22-foot median strip with a 2-foot thick stone barrier in its center is necessary for highway safety, then let it be provided for safety but let us not widen the median to 40 feet through the Park for highway esthetics.

Summarizing, we strongly urge that the highway through the park be depressed sufficiently to keep truck traffic below ground surface and that the proposed right-of-way be narrowed to the minimum required for traffic safety.

In making these recommendations to minimize freeway damage to Overton Park, we want to emphasize that our recommendations are for that specific purpose.

We are in sympathy with the vision, imagination and idealism of highway officials who want to make the nation's highways as attractive and pleasant as possible and to design them so that they not only reflect the cultural values of our country, but, wherever possible, enhance highway travelers' appreciation of those cultural values. We are all highway users as well as park users.

In improving the nation's highways, we do not need to invade our parks because public land is cheaper, or fewer structures will have to be acquired and demolished, or to make the highway more attractive by taking park land. Clear perception of the different values involved and services rendered by different agencies of the public and mutual respect for each other's efforts to provide these different but essential public services must guide our proposals, decisions and actions.

With the establishment of the Department of Transportation and with the clear recognition of the many social values involved in providing transportation facilities, as set forth in the "Protection of Parkland" provision and in section 4(f) of the Department's Organic Act and in the regulations governing highway location and design hearings, we believe that the people of the United States have entered into a new era in the conception, planning and construction of highway and other transportation facilities.

We believe that if Interstate 40 had been envisioned and planned from the beginning in the light of that new mandate from the Congress, we would not be here today holding a design hearing on that portion of the freeway slated to cut through Overton Park. The freeway would have been routed around the Park.

We hold that hope for future transportation projects under the new guidelines of Transportation's Organic Act and its evolving procedures and we want to help make it a reality.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

MOTION TO DISMISS

Defendant through his attorney, the United States Attorney for the District of Columbia, respectfully moves the Court to dismiss the above entitled cause for failure to state a claim over which this Court has jurisdiction or upon which it may grant relief. Incorporated in and made a part of this motion is the affidavit of Edgar H. Swick, Deputy Director of the Bureau of Public Roads, with attachments (Defendant's Exhibit A), and copies of transcripts of hearings held in Memphis, Tennessee, in 1969 and 1961 on this matter (Defendant's Exhibit B).

/s/ Thomas A. Flannery
United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Ellen Lee Park
Assistant United States Attorney

[Certificate of Service omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

AFFIDAVIT

City of Washington
District of Columbia

I, JOHN W. VARDAMAN, JR., after being duly sworn, do hereby depose and say:

1. The document attached hereto as Exhibit A is "A Report Upon ALTERNATE LOCATION STUDIES-FAI 505, Memphis and Shelby County, Tennessee, prepared for STATE OF TENNESSEE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS, NASHVILLE, TENNESSEE, Prepared by HARLAND BARTHOLOMEW AND ASSOCIATES and CLARK, DAILY AND DIETZ, June, 1958."

2. The document attached hereto as Exhibit B is a copy of that part of Mr. Lowell K. Bridwell's testimony before the Subcommittee on Roads of the Senate Committee on Public Works, 90th Cong. 1st and 2nd Sess., May 28, which concerns the Overton Park dispute.

3. Attached as Exhibit C is a copy of a letter dated August 23, 1965, to Mr. Rex M. Whitton, Federal Highway Administrator, from Mr. David M. Pack, Commissioner, Tennessee Department of Highways. This document was produced for me by representatives of the Bureau of Public Roads.

4. Attached hereto as Exhibit D is a letter dated September 2, 1965, to Mr. John C. Cobb, Division Engineer, Bureau of Public Roads, from Mr. L. W. Keeler, Development Engineer, Tennessee Department of Highways. This document was produced for me by representatives of the Bureau of Public Roads.

5. Attached hereto as Exhibit E is a map provided to me by representatives of the Bureau of Public Roads which

shows alternatives A and B and of the proposed route through Overton Park.

/s/ John W. Vardaman, Jr.

January 5, 1970

Subscribed and sworn to
before me this 5th day
of January, 1970.

/s/ Louise Norris
Notary Public, D.C.
My commission expires
Dec. 14, 1970.

Exhibit B

63

URBAN HIGHWAYS

HEARINGS
BEFORE THE
SUBCOMMITTEE ON ROADS
OF THE
COMMITTEE ON PUBLIC WORKS
UNITED STATES SENATE
NINETIETH CONGRESS
FIRST AND SECOND SESSIONS
ON
Urban Highway Planning, Location, and Design

PART 2

MAY 1, 6, 7, 8, 27, AND 28, 1968

Printed for the use of the Committee on Public Works



U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1968

Senator SPONG. Before you go with that, Mr. Bridwell, may I ask if any design concept team at all has been employed in New Orleans?

Mr. BRIDWELL. Not a design concept team as such, Mr. Chairman. What has been done in New Orleans is to bring the city planning department very strongly into the design concept stage rather than hiring outside consultants.

New Orleans is fortunate in having a very fine city planning department headed by Steuart Brehm, who to our way of thinking has demonstrated considerable sympathy for the concept of jointly using space for highways and other community improvements.

If it is agreeable with you I will take a couple of more minutes on New Orleans because this happens to be an extremely important problem and a very interesting one.

Senator SPONG. I wish you would.

Mr. BRIDWELL. It raises such questions as this. Let's assume that we can build a highway along the riverfront that reasonably meets criteria of not being a disruptive force for the French Quarter. Then we also should ask the question is the city of New Orleans doing everything that it can to preserve and enhance this very historic section of the city.

Is it, for example, maintaining and preserving the buildings in the French Quarter. Is it appropriate to the preservation and enhancement of the French Quarter to build motor hotels in it.

Senator SPONG. They built several.

Mr. BRIDWELL. Yes, sir, there are several built, and another one under construction; and a new one just recently announced. If a high-quality highway facility can be built on the riverfront, then would the city of New Orleans entertain the idea of blocking off the narrow congested French Quarter streets for through traffic, forcing the vehicles on to the freeway and thereby eliminating, or certainly substantially reducing the congestion of both traffic and parking in the French Quarter?

Additionally, if the city—and I agree with this so it is not an argument—places a very high value upon the potential for redevelopment of the riverfront then I would ask the question can it tolerate or alternatively what does it intend to do about such structures as are illustrated in exhibit 2? There we see many old warehouses and similar type buildings of a relatively low economic land use, certainly not anything close to the type of land use that has been provided by the construction of a new trade mart and the convention center immediately upstream from Canal Streets. I think the question of highway planning has to be taken in context of what other activities, either public or private, activities in the sense of either policies or programs, are also being undertaken to preserve and to enhance this historical section of the city because certainly its preservation and its enhancement is a policy with which we would agree.

Let me go on to Memphis, if I may, because it presents essentially the same kind of a basic conflict in community social values but in a little bit different context.

In Memphis, again a very significant controversy, and you will not be able to see this well so I will illustrate in figure 9. Between two



FIGURE 9

points bounded by yellow lines near the center of the photograph is a section called Overton Park. It is a municipality owned park, a very beautiful park, highly developed, one in which the city obviously takes considerable pride.

Memphis has provided substantial investment in the form of museums, a zoo, golf course, picnic facilities, and other facilities which make it an extremely attractive and highly used park.

There have been plans for many years to build an interstate highway, interstate Route 40, through the park. This culminated recently in considerable controversy over whether the park could or should be used for an interstate highway. Once again this 4(f) portion of the Department of Transportation Act came into play.

It, in effect, required us to do the same type of thing that we did in New Orleans, go back and look at, is there another feasible and prudent location.

Again experimenting we handled this one a little bit differently. We went to the city council of Memphis and we said, "Yes, there are alternatives. We won't even give you any information on what the alternatives cost in dollars because we don't want that to be a factor in your recommendation of which line to choose. Rather, we would like you to focus upon the conflicting set of community values that are inherent in this kind of a situation."

We told them that a highway could be built through the area on almost any conceivable line that they could pick, that engineeringly it was feasible, that we refused to give them any information as to cost, the primary reason being that Memphis was not involved in the cost of it one way or the other, but rather to concentrate upon the conflicting set of community values that were inherent in each one of the alternatives.

We said, for example, we could build the line which is purple on exhibit A and labeled alternative "b" and if we do this the following consequences will occur, and we told them about the number of houses that would have to be taken out, the number of businesses, the fact that it would traverse the Southwestern University campus, the fact that it would take out a national headquarters office of a private industry organization, that it would require the removal of a high school, and, as I have indicated a considerable number of residences.

We asked "Is that more important to you than the park or is the park more important than the removal of those houses—national headquarters—university—high school complex?"

Alternatively we could go out of the park on the blue line which is labeled alternative "a" on exhibit A and if we do this then the following consequences will result, and again we told them the number of houses, the number of businesses that would be affected, the fact that we would take out a Presbyterian cemetery, that it would go through the middle of a B'nai B'rith home for the aged. We asked, "Now which is more important to you as a community? Would you rather have the park or would you rather have these other things that would be disruptive?"

We went through this for approximately $3\frac{1}{2}$ hours in which we left it completely in the hands of the city council to choose anything they wanted to choose, and after several days the city council voted to stick with the original line through the park.

Now, two or three things happened in the course of that activity. One is that no one was able to say that this community value, namely, the Southwestern campus, is worth x number of dollars and the trees in Overton Park are worth x number dollars because we don't have any method of assigning that kind of a quantifiable factor to any one of these things for labeling community values, so the elected representatives of the city reached their intuitive and subjective judgment, at any rate.

They said "These other things are more important to us as a community than the location through Overton Park."

Now, we still have before us the problems of how do you design this to minimize damage, and that isn't decided yet. The only thing that has been decided is that, yes, we will go through Overton Park, but the witnesses who have appeared in this set of hearings have been highly critical of the highway program for precisely this kind of a decision, or for the decision in New Orleans, or for any number of other decisions which have been made regarding location and design in urban areas. They have placed their own personal set of values or that the organization they represent, their organization's on this kind of a situation.

There is no nice, easy answer to this and there never will be. There won't be in an urban renewal program or one that I recently ran into involving expansion of a university complex.

Any time there is disruption to an established pattern in the urban environment there necessarily must be conflicting sets of values brought into play and someone has to make the decision about which set of values prevails. The Secretary testified yesterday that except for very unusual circumstances the decision of the local people would prevail, in the form of the action of the elected representatives, their mayor, their city council, their appropriate local officials.

We have one other project here that I want to talk about because it represents just a little bit different situation than either New Orleans or Memphis, but again we are constantly working with what can be called conflicting sets of community values.

In this particular instance this is Cambridge, Mass. Keep in mind that in both New Orleans and Memphis we were dealing with a prob-

[EXHIBIT C]

STATE OF TENNESSEE
DEPARTMENT OF HIGHWAYSHighway Building
Nashville 37219

August 23, 1965

Mr. Rex M. Whitton
Federal Highway Administrator
U.S. Department of Commerce
Washington, D.C. 20235

Dear Mr. Whitton:

Subject: Tennessee Project I-40-1 (68)3,
Shelby County - Location Through
Overton Park in Memphis

About a year ago, this Department reviewed the selected location for Interstate Route 40 through Memphis to determine whether or not some modification of a section of the route could reasonably be made which would avoid crossing Overton Park. Some of the citizens of Memphis had voiced opposition to the routing through the Park. We are highly appreciative of the great value of large park areas within large cities and realize that we are all obligated to avoid destruction of such areas where reasonably possible. However, we must carefully view all of the involved factors in this case with an ultimate objective of preservation of the best public interest. The facts are that total area of Overton Park is approximately 340 acres and our proposed highway would use only approximately 20 acres. Therefore, it cannot be said that reduction in Park area is extreme in proportion. We do, however, propose to minimize the area of actual taking of Park land and also to minimize the disruptive effect on Overton Park through careful attention to location and design details.

Our engineering staff made projections for two alternate routes which appeared to have possibilities for avoiding the

crossing of Overton Park. These are shown on Line "A" and Line "B," respectively, on a map of Memphis enclosed. Estimates of the costs of acquisition of rights-of-way and construction on each of these alternate lines were prepared and were compared with the costs estimated for a comparable section of the original route passing through Overton Park. Our estimates showed that the total costs for rights-of-way and construction for Lines "A" and "B" and the original routing were as follows:

Line "A" - R/W and Construction	\$26,289,000
Line "B" - R/W and Construction	\$31,325,000
Original Line - R/W and Construction	\$17,141,000

Thus it was determined that for the items of right-of-way acquisition and construction the original line through Overton Park had a cost advantage of more than \$9,000,000 as compared with the least costly of the two possible alternatives considered. It was obvious that it was strongly in the best public interest to continue with our selected routing through Overton Park. In further reviewing this situation at this time we have taken into consideration the comparative user benefits of the two alternate Lines "A" and "B" as compared with the line through Overton Park. We estimate a 1987 ADT of 80,000 and that Line "A" alternate would add approximately 3/10 mile to the travel distance and Line "B" would add approximately 15/100 mile as compared with the more direct line through Overton Park. Considering only the through Interstate traffic without considering interchange movements, it is noted that the annual user costs for the 3 lines being compared are as follows:

Line "A"	10,397,000
Line "B"	10,032,000
Original location through Overton Park	9,615,000

Thus it is seen that there is a substantial economic advantage in favor of our selected route through Overton Park in terms of users benefit. This annual savings to users in the amount of approximately \$780,000 would be reflected as an initial cost savings of \$8,970,000 as compared with Line "A" and an initial cost savings of \$4,780,000 as compared

with Line "B." Taking this element into consideration together with the comparative costs of right-of-way and construction would result in a total net economic advantage for the line through the Park in the amount of \$18,118,000 as compared with Line "B" and an advantage of \$18,964,000 as compared with Line "A."

In addition to the economic justification there are of course other important considerations which must be recognized in determination of a location in this case.

The route through Overton Park is favorable with respect to displacement of persons and destruction of property. We have made a survey and find that in this respect the original route compared with Lines "A" and "B" as shown in the following table:

Line "A"

Residential Units	771 = 3065 people
Commercial & Industrial	46 = 1300 people
Churches	3 = 75 (actually employed) 7,500 people affected
Schools	2 = 80 (actually employed) 2,000 people affected
Hospitals & Homes for Aged	1 = 200 people
Total	4720 people

Line "B"

Residential Units	428 = 1563 people
Commercial & Industrial	125 = 638 people
Churches	5 = 60 (actually employed) 4,000 people affected
Schools	3 = 125 (actually employed)
Total	2386 people

This route would cross the property of Southwestern University and would destroy valuable properties in the business area on Summer east of East Parkway.

Original Line Through Overton Park

Residential Units	412 =	2292 people
Commercial & Industrial	30 =	295 people
Churches	4 =	20 (actually employed) 5,600 affected
Schools	None =	0
Total		2607 people

On both Lines "A" and "B" there would be destruction of many fine homes and attendant damages to adjacent valuable properties. These costs are reflected in the estimates for cost of right-of-way.

The route through the Park would minimize disruption of the existing street layout and traffic patterns. Overton Park is a large area without street crossings and consequently the streets adjacent to the Park have been important multilane arterial highways. These are as follows: North Parkway - Summer on the north; East Parkway on the east; and Poplar Avenue on the south. Each of these is a thoroughfare of long continuity. Our proposed route through the Park will span East Parkway with a diamond type Interchange and will not cross either Poplar or North Parkway. Line "A" would result in crossing and recrossing of Poplar Avenue and require an interchange in the vicinity of the intersection of East Parkway with Poplar Avenue. This situation would not be desirable. Line "B" would cross and recross North Parkway - Summer Avenue, and would cross East Parkway near the intersection of North Parkway - Summer which would be undesirable with respect to interchanging.

The facts described above have convinced us that it is strongly in the best public interest to continue with our intention to construct the highway through Overton Park. We have, however, continued efforts to minimize the taking of Park land and to minimize any possible reduction in recreation and aesthetic values of the Park. We have studied the possibility of moving the interchange originally

planned at East Parkway to Hollywood in an effort to reduce taking of Park area. Our studies showed that it is not advisable to move the interchange from East Parkway to Hollywood for the reason that an interchange at Hollywood would not conform with the existing city street plan and could not provide for traffic needs without reconstruction.

In continuation of our efforts toward the objectives stated above, we have recently been able to achieve two developments which promise to reduce the impact of the highway location on the Park. One of these is that arrangements appear to be possible which can permit shifting of our location a short distance northerly to move somewhat out of a particular wooded recreation area of the Park and to follow the right-of-way of a former street car line which already severs the Park area. The old street car right-of-way is presently in use solely by the Memphis Transit Authority for travel by street buses which have replaced the former street cars. It is indicated that it will be possible to remove the street buses and utilize the street car right-of-way as part of the width of the Interstate Highway. The advantages are obvious.

The other development mentioned is that we have determined that a diamond type interchange at the crossing of East Parkway at the eastern edge of Overton Park can replace the interchange originally planned with a consequential reduction of taking of Park land for interchange ramps. Our Consultant Engineer, employed to design the project, has been instructed to proceed to develop plans in accordance with the location along the old car line and with the diamond type interchange at East Parkway.

The grade elevation through Overton Park will be designed so as to require a minimum width of Park land. The planning will allow for shielding from view and noise by appropriate roadside planting. We will provide adequate pedestrian overpasses with careful design to conform with the Park setting as far as possible. Adequate vehicular separation structures will be provided for the Park roads.

We hope that the information and discussion herein will reassure you that our Department was correct in selecting the route through Overton Park and that your Department was correct in approving our route selection. We regret that some of the citizens of Memphis have voiced opposition to our location. We are in sympathy with their high regard for the value of the Park and recognize their sincerity of purpose. However, it is thought that in our position of responsibility to consider all facts involved we are impelled to proceed as planned. We believe that when the project has been constructed, the public will quickly recognize the great contribution of the facility in solving a major traffic problem in Memphis and will see that Overton Park has been affected only to a minor extent.

Yours truly,

/s/ David M. Pack
Commissioner

DMP:hf

Enclosure

cc: Mr. J. C. Cobb
Staff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

NOTICE OF DEPOSITION

To: Joseph M. Hannon, Esq.
Assistant United States Attorney
United States Courthouse
Washington, D.C. 20001

Please take notice that, pursuant to the Federal Rules of Civil Procedure, plaintiff Citizens to Preserve Overton Park, Inc., will take the deposition of Lowell K. Bridwell before a duly qualified notary public in Suite 900, Farragut Building, 900-17th Street, N.W., Washington, D.C., 20006, commencing at 4 o'clock p.m. on Friday, January 16, 1970. The deposition will continue from day to day until completed.

John W. Vardaman
900-17th Street, N.W.
Washington, D.C. 20006
Tel. No.: 296-8800
Counsel for Plaintiff
Citizens to Preserve Overton
Park, Inc.

Dated: January 9, 1970

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

MOTION FOR A PROTECTIVE ORDER

Defendant through his attorney, the United States Attorney for the District of Columbia, respectfully moves the Court pursuant to Rule 30(b), Federal Rules of Civil Procedure, for a protective order providing that the deposition of Lowell K. Bridwell scheduled for January 16, 1970 not be taken pending disposition of the motion to dismiss scheduled to be heard January 23, 1970.

/s/ Thomas A. Flannery
United States Attorney

/s/ Joseph M. Hannon
Assistant United States
Attorney

/s/ Ellen Lee Park
Assistant United States
Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

ORDER

Upon consideration of defendant's motion for a protective order and plaintiffs' response thereto, and it appearing that during oral argument of said motion counsel for plaintiffs agreed to withdraw the notice of taking the deposition of Lowell K. Bridwell on January 16, 1970, it is by the Court this 23rd day of January, 1970

ORDERED that defendant's motion for a protective order be granted and that the deposition of Lowell K. Bridwell shall not be taken pending disposition of defendant's motion to dismiss.

/s/ William B. Jones
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

MOTION TO DISMISS AMENDED COMPLAINT

Defendant through his attorney, the United States Attorney for the District of Columbia, respectfully moves the Court to dismiss the complaint as amended. Incorporated in and made a part of this motion is the affidavit of Edward H. Swick, Deputy Director of the Bureau of Public Roads, with attachments (Defendant's Exhibit A), and copies of transcript of hearings held in Memphis, Tennessee, in 1969 and 1961 on this matter. (Defendant's Exhibit B.)

/s/ Thomas A. Flannery
United States Attorney

/s/ Joseph M. Hannon
Assistant United States
Attorney

/s/ Ellen Lee Park
Assistant United States
Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

AFFIDAVIT

I Billy Brink after being duly sworn do hereby depose and say:

1. I am an engineer in the General Engineering Division of the Bureau of Reclamation, Department of the Interior. In my capacity as an engineer I am familiar with the engineering and design of a number of projects which include the use of an inverted siphon. Those projects include:

a. New River Siphon on the All American Canal System—Boulder Canyon Project.

b. Big Thompson River Siphon—Colorado Big Thompson Project.

c. Bacon Siphon and the Wahloke Siphon on Columbia Basin Project.

2. Basically an inverted siphon is an underground conduit with suitable inlet and outlet structures somewhat resembling a culvert through which water is conveyed by natural siphonic action. The use of an inverted siphon is a well-accepted engineering technique which I believe to be in common use throughout the United States.

3. In any situation where an inverted siphon is used, it will require some maintenance. This generally includes keeping the siphon clear of debris by use of trashracks, insuring that the stagnant water does not become a health hazard and providing suitable barriers to insure that it is not a hazard to children. However, with proper design and consideration given to these factors, there should be no undue difficulty in overcoming these maintenance problems.

/s/ Billy J. Brink

[Subscription omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

AFFIDAVIT OF B. M. DORNBLATT

City of New Orleans

Parish of Orleans: ss

I, B.M. Dornblatt, after being duly sworn, do depose and say:

1. I am a Civil Engineer with the firm of B.M. Dornblatt and Associates, Inc. I have had experience in designing free-ways in New Orleans and in other areas of this State and highways elsewhere in the United States.

2. On a number of occasions my firm has designed free-ways and highways portions of which have no natural gravity drainage. The problem of a lack of natural gravity drainage occurs because that portion of the highway is at or below natural drainage lands. In many instances, this arises in the

case of freeways which are depressed below grade. It is not unusual to design a section of a freeway so that it is depressed below the point where natural gravity drainage is available. My firm has designed the following portions of freeways which, because they were depressed, had no natural gravity drainage, for example, the tunnel on I-310 under the Rivergate Exhibit Facility at the foot of Canal Street in New Orleans, and an underpass on which is now I-10 at Black Bridge in New Orleans, together with underpass at Carrollton Avenue and City Park Avenue in New Orleans. I know of the following proposed freeways which I understand have no natural gravity drainage because of their depressed design: the St. Louis Riverfront Expressway and Philadelphia's "Delaware" Expressway in which pumping facilities are utilized for drainage.

3. In developing the design for situations where there is no natural gravity drainage, we have used pumping stations to drain any accumulated water or rainfall from the freeways. The use of pumping mechanisms in such situations is a well accepted engineering technique which I am sure is in common use throughout the United States. As a general matter, properly designed drainage and pumping facilities could overcome any problem of lack of natural gravity drainage for a depressed freeway.

4. In any situation where pumps are used to drain rainfall from a freeway, there is a potential problem of power failure for these pumps. This problem is generally overcome by auxiliary power sources as standby generators and dual sources of power with switching gear to automatically transfer from one circuit to the other should either fail.

5. The I-310 tunnel was constructed below the natural water table and the Carrollton Avenue Underpass was constructed in what was once a canal. While costs are somewhat increased due to need for external waterproofing and possibly to take care of uplift—this factor poses no engineering or construction problems.

/s/ B. M. Dornblatt

[Subscription omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

AFFIDAVIT

City of Washington)
District of Columbia) ss:

I, Robert M. Kennan, Jr., being first duly sworn, do depose and say:

1. I am Chairman of the Roads Subcommittee and a member of the Board of Trustees of The Committee of 100 of the Federal City, a civic planning organization founded in 1923. In that capacity and as a matter of public interest I have followed closely all proposals, actions and developments relating to the Interstate Highway System in the District of Columbia for the past several years. I am generally familiar with the locations and proposed locations and designs and proposed designs of the various elements of that System including the:

- (1) Potomac River Freeway, I-266 (Sections B2-B4);
- (2) Center Leg of the Inner Loop, I-95 (Sections C1-C4), terminating at New York Avenue; and
- (3) South Leg of the Inner Loop, I-695 (Sections B1-B6).

The proposed designs for each of these segments of the Interstate System involve one or more tunnels. The proposed six-lane Potomac River Freeway will extend from the proposed Three Sisters Bridge across the Potomac River approximately three-quarters of a mile west of Key Bridge to the vicinity of 31st and K Streets, N.W. According to the design proposals for the Potomac River Freeway, the three westbound lanes will, at a point west of Key Bridge, proceed in a tunnel under the C&O Canal to an alignment between the present Canal Road and Georgetown University. The three eastbound lanes will be in a tunnel under the Georgetown waterfront and the C&O Canal for approximately one-half mile from a point between the present Canal Road and Georgetown University to 31st Street, N.W.

The eight-lane Center Leg of the Inner Loop (now partially completed) will extend from an interchange in the vicinity of South Capitol Street and Virginia Avenue, S.W. to New York Avenue between Second and Third Streets, N.W. The design proposals for the Center Leg provide for an eight-lane tunnel approximately one-half mile in length from the vicinity of the intersection of Canal and D Streets, S.W., under the Mall in front of the Capitol, to Constitution Avenue between Second and Third Streets, N.W.

The proposed six-lane South Leg of the Inner Loop will extend from a point northwest of the Lincoln Memorial in West Potomac Park to the completed Southwest Freeway in the vicinity of 12th Street and Maine Avenue, S.W. The proposed designs for the South Leg provide for a six-lane tunnel approximately 1.2 miles long from a point northwest of the Lincoln Memorial, under the Mall and the Tidal Basin, to 14th Street, S.W.

/s/ Robert M. Kennan, Jr.

[Subscription omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

AFFIDAVIT

I, John W. Vardaman, Jr., after being duly sworn, do depose and say:

The following statistics are based on public information available in Bureau of Public Roads Forms PR-511, entitled Status of Development of the National System of Interstate and Defense Highways.

**Six Lane Highway Projects in Downtown Areas
Completed between 1966 - 1969**

1. New Orleans, Louisiana

Rt. 3

Contract Number: 10-3-(29)-154-C and others

Cost: \$42,527,408

Average cost per mile: \$21,263,704

Length: 2.0 miles

2. Washington, D.C.
Rt. 295
Contract Number: I-295-2-(22)-4-R and others
Cost: \$9,576,522
Average Cost per mile: \$7,980,435
Length: 1.2 miles
3. Providence, Rhode Island
Rt. 95
Contract Number: I-95-3-(6)-37-R and others
Cost: \$54,966,392
Average Cost per mile: \$8,328,212
Length: 6.6 miles
4. West Palm Beach, Florida
Rt. 75
Contract Number: I-75-1-(17)-0-EC and others
Cost: \$19,621,230
Average Cost per mile: \$6,131,613
Length: 3.2 miles
5. New Orleans, Louisiana
Rt. 10
Contract Number: I-10-5-(2)-224-E and others
Cost: \$28,724,039
Average Cost per mile: \$11,968,349
Length: 2.4 miles

/s/ John W. Vardaman, Jr.

[Subscription omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

ORDER

This cause having been set for hearing on defendant's motion to dismiss and plaintiffs' motion for a preliminary injunction and during oral argument plaintiffs having moved to transfer this cause to the United States District Court for the Western District of Tennessee, and defendant having no objection to said transfer, and it appearing that defendant

is willing to waive the venue provision of 28 U.S.C. 1391(e) should plaintiffs join State and local officials in Tennessee as parties and defendant having agreed not to concur in the award for any contracts for this project within Overton Park prior to March 1, 1970, it is by the Court this 23rd day of January, 1970, without ruling on defendant's motion to dismiss or plaintiffs' motion for a preliminary injunction,

ORDERED that plaintiffs' motion to transfer the above entitled cause to the United States District Court for the Western District of Tennessee be and it hereby is granted, and the Clerk of this Court is directed to transfer this cause forthwith upon the entry of this order to the United States District Court for the Western District of Tennessee.

/s/ William B. Jones
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

[Caption omitted in printing]

**AMENDED COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTION**

Plaintiffs, for their complaint against defendants herein, allege as follows:

*Nature of the Action,
Jurisdiction and Venue*

1. This action for a declaratory judgment, injunction, and for such other and further relief as may be deemed necessary arises under the Constitution and laws of the United States, namely the Fifth and Fourteenth Amendments to the United States Constitution; 28 U.S.C. §§ 128, 138, 102; and 49 U.S.C. § 1653(f). There exists between the parties an actual controversy, justiciable in character. The matter in controversy exceeds the sum of \$10,000, exclusive of interest and costs. This Court has jurisdiction under 5 U.S.C. §§ 701-706; 28 U.S.C. §§ 1331(a), 1332, 1361 and 2201-02. The defendant Volpe is an officer of the United States and committed the acts alleged herein in his official

capacity and under color of legal authority. The defendant Speight has headquarters in, and resides in, the State of Tennessee. The cause of action arose in Memphis, Tennessee and venue lies in the Western District of Tennessee under 28 U.S.C. § 1391(b).

Plaintiffs

2. Citizens to Preserve Overton Park is a Tennessee corporation which has its principal place of activity in Memphis, Tennessee. It was organized for the purpose of preserving, protecting and enhancing Overton Park as a park land and recreation area. Its organizers and members are residents of Memphis, Tennessee who use Overton Park as a park land and recreation area and who have been active since 1964 in efforts to preserve and protect Overton Park as a park land and recreation area.

3. Mr. William W. Deupree is the owner of property located at 1730 Glenwood Place, Memphis, Tennessee. He is a taxpayer of the City of Memphis, the State of Tennessee and the United States.

4. Mrs. Sunshine K. Snyder is an owner of property located at 327 Kenilworth Place, Memphis, Tennessee which is approximately 1150 feet away from the proposed route of Project No. 140-1(90)3 (as described in paragraph 10 below). That property will be adversely affected by the construction of that project and its use as an Interstate Highway. Mrs. Snyder pays taxes to the City of Memphis, the State of Tennessee and the United States.

5. Sierra Club is a nonprofit California corporation which has its principal office in San Francisco, California. It has 70,000 members and is active throughout the United States in promoting the public use of and preserving and protecting the natural resources of the United States.

6. The National Audubon Society, Inc. is a nonprofit membership corporation organized and existing under the laws of New York with its principal office in New York, New York. It has been active continuously since its foun-

dation in 1905 in engaging in activities involving preservation, protection, conservation and improvement of natural areas and the quality of the environment in the United States.

Defendants

7. Defendant John A. Volpe is the Secretary of the Department of Transportation and as such has responsibility for the administration of the various federal-aid highway programs, including that relating to the National System of Interstate and Defense Highways (the "Interstate System") of which Project No. I-40-1(90)3 is a part.

8. The defendant Charles W. Speight is Commissioner of the Tennessee Department of Highways and in that capacity is responsible for planning, designing and constructing highways, including federal-aid highways, in the State of Tennessee.

Overton Park

9. Overton Park is a 342-acre park and recreation area located in midtown Memphis, Tennessee. Since 1901 it has been publicly owned by the City of Memphis. Within the park are located the Overton Park Zoo, a 9-hole municipal golf course, an outdoor theater, an art gallery, an art academy, a nature trail, a bridle path, a small lake, a formal garden, picnic areas and playgrounds and substantial woodland. In 1967 approximately 1½ million people visited the Zoo alone.

Project No. I-40-1(90)3

10. Federal-Aid Highway Project No. I-40-1(90)3 (the "project") is a six-lane, limited access, interstate highway to be used for private and commercial purposes which is a portion of Interstate Route 40. The project will begin at McLean Boulevard in Memphis, Tennessee and extend eastward proceeding through the entire width of Overton Park,

a distance of approximately 4,800 feet, and then extend to Maris Street. At the western end of Overton Park, the project will be approximately 250 feet in width; at the eastern end it will be approximately 450 to 500 feet in width. There will be a 1,200-foot access ramp within the eastern end of the park. The project will include a 40-foot median strip between the eastbound and westbound lanes. The current plans contemplate that the project will vary between being slightly depressed in some areas to a five- to six-foot fill at Lick Creek. It will not be tunneled. The project will require the use of at least approximately 26 acres of Overton Park. It will affect adversely many more acres. The right of way for the project runs along one side of the Zoo, one side of the playgrounds, and the playing fields, passes by the tip of the lake, and then passes through a heavily wooded area of the park. Construction of the project and its use as an interstate highway will have an adverse effect on the Zoo, the playing fields, use of the lake and will require the destruction of some of the wooded area in the park.

11. On April 19, 1968, the Federal Highway Administrator preliminarily approved the proposed location of the project.

12. On or about June 4, 1969, the Department of Highways for the State of Tennessee (hereinafter the "Tennessee Highway Department") requested that the defendant Volpe or his subordinates approve a design of the project which the Tennessee Highway Department submitted to the United States Bureau of Public Roads. On or about November 5, 1969, defendant Volpe approved that proposed design. Alternatively defendant Volpe approved that design on the condition that the design be modified in accordance with certain requirements which he stipulated. The Tennessee Highway Department has given notice that the design of the project will be modified according to defendant Volpe's stipulation.

13. On or about November 10, 1969, the City of Memphis transferred to the State of Tennessee property in Overton Park for the right of way for the project. The Tennessee Highway Department has stated that on or about December 19, 1969, it proposes to take bids for construction of parts of the project, including a part of the project which will pass through Overton Park.

14. The Tennessee Highway Department is proceeding with the construction of the project on the assumption that it will receive from the Federal Government, pursuant to an obligation undertaken by defendant Volpe, reimbursement of up to 90 percent of the costs of the construction of the project. The Tennessee Highway Department would not proceed with construction of the project if it believed that such Federal funds could not lawfully be paid to the State of Tennessee.

15. If defendant Volpe is enjoined from taking any further action with respect to the project or enjoined from obligating the Federal Government to reimburse, or from reimbursing or paying, the Tennessee Highway Department 90 percent of its cost of the construction of the project, the Tennessee Highway Department will not construct the project through Overton Park. Unless defendant Volpe is so restrained, the Tennessee Highway Department will begin construction of that part of the project which passes through Overton Park immediately after taking bids.

Violations of Federal Statutes
23 U.S.C. § 128

16. Section 128 of Title 23 provides:

“(a) Any state highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hear-

ings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway.

“(b) When hearings have been held under subsection (a), the State highway department shall submit a copy of the transcript of said hearings to the Secretary, together with the certification.”

Paragraph 8.c(1) of the Policy and Procedure Memorandum 20-8 (hereinafter PPM 20-8), 34 Fed. Reg. 727 (1969) 23 C.F.R. App. A, promulgated by the Department of Transportation to implement 23 U.S.C. § 128 provides:

“(1) The State highway department shall provide for the making of a verbatim written transcript of the oral proceedings at each public hearing. It shall submit a copy of the transcript to the division engineer within a reasonable period (usually less than 2 months) after the public hearing, together with:

“(a) Copies of, or reference to, or photographs of each statement or exhibit used or filed in connection with a public hearing.

“(b) Copies of, or reference to, all information made available to the public before the public hearing.”

Paragraph 8.b(2) provides:

“(2) Provision shall be made for submission of written statements and other exhibits in place of, or in addition to, oral statements at a public hearing. The procedure for the submissions shall be described

in the notice of public hearing and at the public hearing. The final date for receipt of such statements or exhibits shall be at least 10 days after the public hearing."

17. On May 19, 1969, the Tennessee Highway Department held a public hearing with respect to the project. According to the notice published by the Tennessee Highway Department the objectives of the hearing were:

"to provide the local officials and other citizens with complete factual information with respect to the tentative schedules for right-of-way acquisition and construction, and the location, the design features, and the economic, social and environmental effects which the project will have on the community and to acquaint the public with the relocation assistance offered by the State to those persons whose homes or businesses may be affected because of the proposed construction of said project. Following the presentation the local officials and citizens will be afforded the opportunity to be heard relative to the project to provide the Department with factual information which is pertinent to the specific location and major design features, including the social, economic, environmental and other effects thereof, which will best serve the public interest."

18. On or about June 4, 1969, a transcript containing some of the testimony given at the May 19, 1969, hearing was submitted to the Bureau of Public Roads. The Tennessee Highway Department, by Mr. Henry K. Buckner, certified to the Bureau of Public Roads that the transcript was a partial true transcript of all that was said at this hearing. It also certified that:

"the Department of Highways has considered the economic and social effects of the location of the project, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the affected community."

19. The transcript of the public hearing held on or about May 19, 1969, which the Tennessee Highway Department submitted to the defendant Volpe, did not contain testimony of at least eight witnesses who appeared and gave oral testimony at that hearing. Six of those witnesses opposed either, or both, the location and the design of the project.

20. The Tennessee Highway Department has not submitted to defendant Volpe a copy of the verbatim written transcript of the oral proceeding at the public hearing held on or about May 19, 1969, with respect to the project. Defendant Volpe's approval of the project without having received such a transcript violated 23 U.S.C. § 128(b) and PPM 20-8, Paragraph 8.c(1).

21. The notices of the public hearing scheduled for May 19, 1969, published in the *Commercial Appeal*, Memphis, Tennessee, on April 15, 1969, and May 12, 1969, did not describe the procedure for submission of written statements and other exhibits in place of, or in addition to, oral statements at the public hearing. These notices did not comply with 23 U.S.C. § 128 and the rules promulgated thereunder by the Department of Transportation, including PPM 20-8, Paragraph 8.b(2), 34 Fed. Reg. 727 (1969), 23 C.F.R. App. A. In the absence of proper notices, the hearing on May 19, 1969, did not comply with 23 U.S.C. § 128 including the rules promulgated thereunder by the Department of Transportation including PPM 20-8, Paragraph 10.d. Defendant Volpe's approval of the project in the absence of the hearings that comply with section 128 is illegal.

22. For the reasons stated in paragraphs 16-21, defendant Speight and the Tennessee Highway Department have not held a public hearing in compliance with the requirements of 23 U.S.C. § 128 and PPM 20-8. Defendant Speight has agreed with Volpe to construct this project. In the absence of a lawful hearing, construction of this project will be illegal.

23 U.S.C. §138, 49 U.S.C. §1653(f)

23. Section 138 of Title 23, United States Code, provides:

"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

24. Construction of the project will require use of a number of acres of park land and recreation area from Overton Park. Overton Park is a park and recreation area of state and local significance. Overton Park has been determined by the state and local officials having jurisdiction thereof to be of state and local significance.

25. Neither defendant Volpe nor any previous Secretary of Transportation has made any finding that there is no feasible and prudent alternative to the use of such public park and recreation areas. Defendant Volpe has made no finding that the program for the project includes all possible plan-

ning to minimize the harm to such park and recreation areas. In the absence of such findings, his approval of the project has violated 23 U.S.C. § 138 and 49 U.S.C. § 1653(f).

26. There are feasible alternatives to the use of such park and recreation areas. One or more of the feasible alternatives are prudent alternatives. The project does not include all possible planning to minimize harm to such park and recreation areas.

27. Defendant Speight has agreed with defendant Volpe to construct this project as a federal-aid Highway. For the reasons set forth in paragraphs 23-26, defendant Volpe's approval of this project, and any action based on that approval, violates 23 U.S.C. § 138 and 49 U.S.C. § 1653(f). Unless restrained, defendant Speight will construct this project in accord with his agreement with defendant Volpe and thereby aid, abet, assist Volpe in constructing this project in violation of 23 U.S.C. § 138 and 49 U.S.C. § 1653(f).

28. Defendant Speight, in proceeding with the construction of this project, is proceeding upon the assumption that in due course the State of Tennessee will receive from the Federal Government, pursuant to an obligation undertaken by defendant Volpe, 90 percent of the cost of the construction of the project. He would not be proceeding with the construction of the project if he believed that such Federal funds could not lawfully be paid to the State of Tennessee. If defendant Speight proceeds to obligate funds for the project, and if it is then determined that the requirements of Title 23 of the U.S. Code and the administrative regulations and directives promulgated thereunder have not been satisfied, the State of Tennessee will not be eligible for Federal aid reimbursement of the costs of the project and the entire financial burden of the project will fall on Tennessee revenues.

23 U.S.C. § 102

29. Defendant Volpe plans to treat his approval of the project as a contractual obligation of the Federal Govern-

ment and to make expenditures to the State of Tennessee pursuant thereto. Because that approval, having been given in violation of 23 U.S.C. §§128, 138, and 49 U.S.C. §1653(f), is null and void and without legal effect, such expenditures will violate 23 U.S.C. §102.

30. In the absence of a lawful hearing and in the absence of consideration of, and compensation for the taking of, plaintiffs' interest in Overton Park, the Secretary's approval of the project was illegal and in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

Prayer

WHEREFORE, Plaintiffs pray as follows:

1. That the actions and proposed actions of the defendants alleged herein be declared and adjudged unlawful;

2. That the defendants be permanently enjoined from taking any further action whatever relating to the project unless and until he has complied with the provisions of Title 23 of the U.S. Code, and other statutes referred to herein;

3. That pending disposition of this action, this Court preliminarily enjoin the defendants from (1) taking any further action with respect to the Federal-Aid Highway Project No. I-40-1(90)3 (the "project"), (2) treating the approval of the design of the project which defendant Volpe granted on or about November 5, 1969, as a basis for any further action with respect to that project, or (3) obligating or disbursing any funds to the Department of Highways for the State of Tennessee for this project;

4. That the plaintiffs recover costs and attorney fees; and

5. That the plaintiffs have such other and further relief as the Court may deem appropriate.

John W. Vardaman, Jr.
Wilmer, Cutler & Pickering
900 17th Street, N.W.
Washington, D.C. 20006
Telephone: (202) 296-8800

Attorney for Plaintiffs

January 30, 1970

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
[Caption omitted in printing]

AFFIDAVIT

I, ROBERT CONRADT, after being duly sworn, do hereby depose and say:

I am currently a professional consultant in transportation planning. I have a Bachelor of Science degree from California Institute of Technology and a certificate in Traffic Engineering from Yale University. I have had 20 years experience in the field of traffic and highway engineering and transportation planning.

I served as traffic engineer and assistant traffic and safety director for the New Mexico State Highway Department. I was with the New Mexico State Highway Department from 1950 to 1957.

In 1957 I joined the transportation engineering firm of De Leuw, Cather and Company. Between 1957 and 1965, among other things, I was a project engineer in charge of comprehensive transportation planning studies for Auckland and Dunedin, New Zealand and I served as a project engineer and project manager for the location and geometric design of freeways in Sacramento, California, Las Vegas, Nevada and Salt Lake City, Utah.

In 1965 I worked with the architectural and planning firm of John Carl Warnecke and Associates and I participated in the planning of major street and highway improvements in Washington, D.C., San Francisco, California, and Honolulu, Hawaii.

In 1966 I became Head of Highway Planning and Design for De Leuw, Cather and Company of Canada Limited in Toronto, Ontario. I specialized particularly in the functional planning and design of freeways and arterial highway systems in urban areas, and I served as a consultant on the planning of traffic facilities for the Walt Disney World project in Florida and served as a special advisor to the architects on the urban design concept team for the study of proposed Interstate highways in Baltimore, Maryland. I served as a lecturer to engineers from various highway departments on the subjects of highway design and transportation planning in university courses and training seminars in Pennsylvania, Missouri, Alaska, New York, South Africa and in several provinces in Canada. I also directed a research project for the Department of Highways of Ontario for the purpose of developing a new urban transportation planning procedure.

In 1969 I became an independent transportation planning consultant. I advised opponents of the proposed Riverfront Expressway in New Orleans, Louisiana, on the highway planning and design aspects of the proposal and I served as traffic consultant to the planners for a large land development project near Orlando, Florida. I also entered into an agreement with De Leuw, Cather and Company of Canada Limited to serve them as a special consultant on projects in Canada.

At the request of Mr. John W. Vardaman, Jr., I traveled to Memphis, Tennessee, to examine that portion of the proposed route of Interstate 40 which is proposed to pass through Overton Park. I was asked to review the proposed location and the surrounding areas and to comment on the appropriateness of that portion of the route which is proposed to pass through Overton Park and upon the availability of alternative routes.

I made a tour of the Memphis urban area and examined in some detail that area between the proposed interchange of I-40 and Route 255 west of the park and the point to which actual construction has proceeded on the eastern side of the park which is approximately at Bon Air Street. In addition, I studied maps of Memphis and the surrounding area and reviewed in some detail the June, 1958, Report Upon ALTERNATE LOCATION STUDIES—FAI 505, Memphis and Selby County, Tennessee, prepared by Harland Bartholomew and Associates, and the report, TRANSPORTATION PLAN, Volume I, of the 1968 Memphis Urban Area Transportation Study, prepared by Harland Bartholomew and Associates.

My conclusions are:

1. That although the planning of the route has been thorough with regard to the consideration of engineering factors such as construction costs, travel distances, and the treatment of alignment, grade, bridges, retaining walls and drainage, it has not adequately considered the full value of Overton Park nor the total economic, social, environmental and long-range transportation effects of the proposed route;
2. That even given the present state of right-of-way acquisition for this route, it is not obvious that the proposed route through Overton Park is the most appropriate for this project;
3. That on the basis of my inspection and the studies I have examined, I would not and could not at this time make a finding that there are no feasible and prudent alternative locations;
4. That there are two potential corridors which, upon detailed study might prove to be preferable alternatives to the presently proposed route. These alternatives are: (a) a corridor which would turn northward at the point where the present route crosses Cyprus Creek east of the park. The corridor would follow Cyprus Creek to a point close to Jackson Avenue at which point it would turn westward.

It would parallel Jackson Avenue until it reached the L and N railroad tracks. It would follow the railroad tracks to a point in the vicinity of North McLean Boulevard and proceed southwesterly until it rejoined the presently proposed route, and (b) a corridor to the south of Overton Park which would turn southeasterly from the present route in the vicinity of Avalon Street, west of the park. It would proceed from North McLean Boulevard to North Cooper Street through the area between Jefferson Avenue and Madison Avenue. It would follow along Union Avenue to Poplar Avenue where it would turn northeasterly and rejoin the presently proposed route at Bon Air Street east of the park.

5. That from the standpoint of sound urban planning, it would be imprudent to proceed with the route through the park without undertaking a study to determine the feasibility of these or other alternative routes. The study should include expert advice on the full social, economic and environmental values of the park, the potential influence of the proposed construction on the adjacent neighborhoods in the vicinity of the park and the opportunities for desirable new urban development created by the route.

The following comments are to further explain the bases for my conclusions stated above.

It is obvious to me that Overton Park is an extremely valuable asset to the city of Memphis. That asset will be severely damaged by construction of the proposed route. I believe it is possible through use of an alternative corridor to achieve nearly the same transportation goals achieved by the proposed route. It is not possible, however, to relocate the park.

Based on my experience in planning and designing urban freeways, I believe that in any case where a proposed freeway, such as I-40, will pass through an urban area, a thorough analysis of the effects of the project including analysis of the effects of alternative locations should be made before the freeway location is decided. The construction of a new freeway should be viewed as a catalyst to development of

the area, and the freeway should be located and designed to serve existing development and to encourage new development in a way that is consistent with community desires and values.

Since the construction of such a project will have far-ranging economic and social effects, a study to determine the proper location of the route should analyze not only the construction cost, the right-of-way cost and the transportation needs to be served but should also identify the social and economic effects of the alternative locations. In addition, an evaluation of the alternative routes should be made on the basis of which route is most likely to encourage and allow development of the entire area in the most desirable fashion. After such a study the alternative routes can be evaluated and one can be chosen on the basis of what will be best from the standpoint of overall urban development.

With respect to the particular situation involving I-40 in Overton Park I believe it would be a serious mistake for the city to complete construction of the proposed route through Overton Park without making the type of analysis discussed above of the presently proposed route, of the alternatives I have outlined and possibly of other alternatives.

I understand that selection of any other route would cause further destruction and dislocation because of the additional right-of-way acquisition which would be necessary. However, the disruptive effects of additional right-of-way acquisition and construction could be minimized by proper urban planning and the long-range effects of selecting another route could be extremely important and beneficial to the city.

Before I could conclude that the present route through the park is the most appropriate route or that other alternative routes are not feasible and prudent, I believe that an analysis of the following factors should be made with respect to each of the possible alternative locations:

1. The total impact on Overton Park and the significance of that impact in terms of social, economic and environmental costs.

2. The requirements for expansion, reconstruction or improvement of the park in order to overcome the impact of the highway construction.

3. The impact on the neighborhoods adjacent to the route, including an assessment of the likely economic and social pressures for redevelopment and desirability of such redevelopment.

4. The opportunities for redevelopment and for new development adjacent to the route and in the right of way of the route. Such development could take advantage of the park nearby and of the new transportation service provided by the route to support a higher density of development in the corridor.

5. The possibilities for establishing the feasibility of a future rapid transit service to the central business district by encouraging higher development densities in the I-40 corridor related to construction of the new route and the availability of the park to the residents who would live in the new high density developments.

I think it is quite important to determine what might be accomplished by redevelopment within the immediate area of each alternative location. The construction of the route will have a strong effect on the adjacent areas within a substantial distance from the right-of-way limits. The effects on land values, zoning, neighborhood sociological structure, environmental quality and other such non-highway factors, could be more significant to the people of Memphis than the transportation service provided by the new route. Therefore, these urban planning factors should be considered carefully.

Only after such an analysis could a prudent selection be made from the various alternatives. An analysis of this nature could be made within a relatively short period of

time provided it were carried out by a qualified team of persons with sufficient experience in urban development economics, urban planning, urban design, social analysis, landscape architecture and transportation. Once the team and the available maps and information were assembled the analysis could be made within 60 to 90 days.

/s/ Robert Conradt

[Subscription omitted in printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DIVISION OF TENNESSEE

[Caption Omitted in Printing]

A F F I D A V I T

I, HENRY K. BUCKNER, JR., Department Attorney for the Tennessee Department of Highways, depose as follows with respect to the allegations in the complaint on the question of violations of Section 128 of Title 23, United States Code 1964 ed.

The Commissioner of Highways has placed with me the responsibility for carrying out the requirements of said Section 128. It is my opinion that the Department has fully considered the economic and social effects of the involved location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as promulgated by the City of Memphis. Reference is made to the partial transcript of the public hearing in question for further opinion in this regard, and the subsequent approval thereof by the Secretary of Transportation.

This approval would appear to be evidence of the Secretary to use discretion on a matter of policy, as is the ques-

tion presented here; namely, the adequacy of the public hearing process employed, so long as the above mentioned considerations have been adhered to.

It is my opinion that the objectives of a public hearing are to provide an assured method for the State to furnish the public with pertinent information concerning highway project proposals and in turn every interested resident is afforded the opportunity to be heard on such proposals. I believe the foregoing sums up the various statements in Policy and Procedure Memorandum 20-8 of January 14, 1969.

If the foregoing be accepted it must follow that an interested resident could not provide pertinent data without having had the benefit of first hearing the proposal of the Department through attendance at the hearing. If there had been attendance such a person would be aware of the provision for written submissions because of my announcement in this regard.

The hearing in question was the second of the two types provided for in the PPM; namely, a "Highway Design Public Hearing". The stated purpose is ". . . to insure that an opportunity is afforded for effective participation by interested persons in the process of determining the specific location and major design features. . . ." Secondly, the only reasonable interpretation of this statement is that attendance is a necessary prerequisite. How else could there be "effective participation"?

The foregoing is to say that no defect in the newspaper notice exists as alleged.

The failure to provide a verbatim transcript has not diminished the quality thereof in my opinion for the reason that absolutely no information was received or views expressed which are different from those as stated on the record by one or several other participants. However, because of a directive from the Bureau of Public Roads that the transcript would not be considered complete until those

participants whose statements were not recorded, were given the opportunity to submit a written statement for the record, I caused a letter (by certified return receipt mail) to be written to each of such participants, inviting the submission of a written statement. Accordingly, in my opinion, no detriment resulted by virtue of the failure to provide a verbatim transcript.

FURTHER DEPONENT SAYETH NOT, this the 18th day of February, 1970.

/s/ Henry K. Buckner, Jr.

Sworn and subscribed to before me,
This the 18th day of February, 1970.

Edna S. Brady
Notary Public

My Commission expires:
1/28/71

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF TENNESSEE

[Caption Omitted in Printing]

**AFFIDAVIT OF WILLIAM S. POLLARD, JR.,
FILED ON BEHALF OF CHARLES W. SPEIGHT,
COMMISSIONER, TENNESSEE DEPARTMENT
OF HIGHWAYS**

STATE OF TENNESSEE
COUNTY OF SHELBY

I, William S. Pollard, Jr., do on oath state the following facts:

I.

That I am 45 years of age and have been a resident citizen of Memphis, Shelby County, Tennessee, for approximately 10 years. My profession is that of civil engineering and I hold degrees of Bachelor of Science and Master of Science in this field from Purdue University. I was an instructor at this university from 1948 to 1949 and was an instructor as well as an assistant professor of civil engineering at the University of Illinois from 1949 through 1955. At the present time, I am a senior partner in the planning firm of Harland Bartholomew & Associates and have been in charge of the Memphis, Tennessee, office since 1960. Prior to this time, I served as chief engineer of this firm where I directed civil engineering work, transportation facility location studies and design projects and interstate highway design, particularly in Memphis, Shelby County, Tennessee. The Memphis office of Harland Bartholomew & Associates has a staff of approximately 80 persons; and, in addition to numerous other projects which our firm engages in, the Memphis office has either done or is now engaged in comprehensive transportation plans and other

urban area development plans including the location of urban freeway locations for Birmingham, Alabama; Memphis, Tennessee; Durham, North Carolina; Raleigh, North Carolina; South Bend, Indiana; Jacksonville, Florida; and Mobile, Alabama.

I am a fellow of the American Society of Civil Engineers, and serve as Secretary-Member to the Technical Council on Urban Transportation Executive Committee, Member of the Executive Committee of the Urban Planning and Development Division, Member of the Council on Environmental Systems, Chairman of the Urban General Planning Committee of the Urban Planning and Development Division. In August 1965, served as Chairman of the Engineering Foundation Research Conference on Engineering Design to Fit the Environment, a member of the American Institute of Consulting Engineers, the Highway Research Board, the Illuminating Engineering Society, the Institute of Traffic Engineers, the National Society of Professional Engineers, the New Jersey Society of professional Planners, and the Society of American Military Engineers. I hold a professional engineer's license in 45 states and the District of Columbia. I have written numerous papers and articles on the subjects which are to be covered in this affidavit and am the author of Chapter 18 "Long-Range Urban Traffic Planning," Institute of Traffic Engineers, Traffic Engineering Handbook.

The firm of Harland Bartholomew & Associates was founded in 1919 for the purpose of providing professional guidance on comprehensive long-range planning to communities. The firm has provided transportation plans for many cities and regions throughout the United States and internationally. These plans have included major streets and highways, public transit, rail, airports, ports and harbors, and parking. The present system of Interstate and Defense Highways is an outgrowth of the Interregional Highway Plan for which Mr. Bartholomew was an urban highway specialist member of the 7-man committee appointed by President Roosevelt.

Comprehensive plans have been prepared by our firm for more than 200 cities in the United States, Canada, the Phillipine Islands, and Morocco, as well as a number of counties and regions. In addition, the firm has provided professional services in other fields, including plans for new cities, military installations, parks, parkways, greenbelts and recreational areas, resort areas, residential developments and land subdivisions, urban renewal and housing, commercial developments, school and public buildings, sanitation water supply and drainage, colleges and universities, shopping centers, industrial complexes and central business district revitalization.

One of the early studies of my firm was a comprehensive city plan for Memphis, Tennessee, completed in 1924, which plan concerned itself with zoning, civic art, recreation, transportation and transit, subdivision controls, and a basis for establishing a city planning commission ordinance. In the 1930's the comprehensive city plan for Memphis was revised by my firm and included consideration of all elements of comprehensive planning. In the early 1950's my firm was again engaged by Memphis to bring up-to-date their zoning ordinances, their subdivision regulations, their transportation planning, their schools, parks, and recreation plans which culminated in a summary report entitled "A Report Upon the Comprehensive Plan" dated December 1955. In its full context, this report includes the proposed location of the east-west Interstate here discussed.

In 1956, my firm prepared for the Board of Commissioners of Shelby County, Tennessee, certain elements of a County comprehensive plan; namely, major streets and highways and subdivision regulations.

Involved in the foregoing described studies for Memphis, Tennessee, were different professional members of our multi-disciplinary staff, some of whom had continuity from the earliest plans in the 1920's. Our staff, at that time and at this time, was comprised of experienced practicing professionals with background experience and training in the

fields of landscape architecture, socio-economic consideration, civic art, civil engineering, civic design, land planning, zoning, comprehensive urban and regional planning, park and recreation planning, transportation planning, architecture, law, and ancillary supportive disciplines.

In summary emphasis, I would observe that we operate using multi-disciplinary teams from our several offices as we address ourselves to extremely complex problems as those we routinely encounter in our practice, which is primarily city planning and secondarily engineering. Over the years, more than 50 reports done by our multi-disciplinary group have related to questions inherent in this issue. Literally, man decades of multi-disciplinary time have been spent in such investigations. They have been comprehensive and not single purpose in character.

II.

Prior to the passage of the Interstate Highway Act in 1956, Harland Bartholomew & Associates was engaged by the City of Memphis and other interested governmental bodies to prepare and recommend a plan in anticipation of the passage of such an act. Without going into detail, suffice it to say that the preparation of such a report required thousands of man hours of work, preparation and study of every conceivable factor which would affect the final decision of the location of the freeways or expressways in Memphis, Shelby County, Tennessee.

It should be said at the outset that the major criteria which a long-range planner must guide himself with in such a situation involve basically the needs of the community as a whole. In regard to the traffic and transportation problems facing the community, naturally, there are many other criteria, including engineering feasibility, economics, disruption of the community, including the effect which the freeway or expressway may have upon buildings, parks, schools, industry, and the like. It should also be borne in mind that the planner begins with the city as it exists, which includes

its street layout, its land use, and its population habits regarding traffic in getting from land use to land use.

This first study above mentioned was completed in 1955 and it was the recommendation of Harland Bartholomew & Associates that the general freeway plan for a circumferential expressway around the city crossed by a north-south route west of the center and an east-west route north of the center was the most feasible and prudent system for this locality. This east-west route or corridor included the passage of the right-of-way through the area that is known as Overton Park. The decision was not based upon the presumptions that the taking of park land might be more economical. It is obvious that designing a system such as herein described includes literally thousands of ideas all of which are interrelated to each other. A system such as the Memphis plan was designed to operate properly only when kept intact. Perhaps nowhere is the truism "everything is related to everything else" more appropriate to keep in mind than in such matters as the planning of urban areas to best serve the total needs of people. These total needs, of course, include a place to live, a place to work, a place to play, and a way to get from each of these places to the others with maximum safety, amenity, and economy. It is that people choose to use automobiles as the primary means of moving themselves from place to place that occasioned the need for major streets and thoroughfares, inclusive of expressways of the sort that this interstate location represents.

Successful, responsive, and responsible comprehensive planning considers the interrelativity of all facets of urban living and establishes proportionality of consequences in ultimately arriving at recommendations. There are trade-offs, and some are positive and some are negative. The optimum is sought. If any element of a comprehensive plan is left out or located so as not to be responsive to the need, the effect of the absence of the service is felt throughout the remainder of the system left to serve the needs of the people. For a transportation element, this effect could

manifest itself in congestion, in reduced safety, in added circuitry, and in not accomplishing the desires of the people to move from place to place; the absence of these needed elements within the system would normally be compensated for by widening of streets within the urban area or by locating a new facility elsewhere and not necessarily responsive to the location of the need. In short, the total area system need in an urban context of the general density of Memphis requires a balanced system of major streets and thoroughfares, some of which should be expressways. Normal and acceptable levels of service to people in an urban area are achieved under spacings of major streets and thoroughfares in a crude "grid" averaging approximately one-half square spacings of four or six moving lane major streets or thoroughfares. Such a grid normally constitutes approximately only 20% of the total street and thoroughfare mileage within the developed urban area and yet this grid normally provides from 70% to 80% of the total urban area traffic service. In developed areas added traffic relief and service to the urban area populace may be obtained by widening existing major streets and thoroughfares, by upgrading them to higher capacity facilities in their present locations or by the addition of new facilities. Since limited access expressway facilities can accommodate approximately three times the traffic volumes per lane that a conventional major street can, and since these expressways can accomplish this at a much greater level of safety, it is not uncommon to find in a comprehensive analysis that the total community interest is best served by the addition of a new expressway facility rather than by widening present facilities throughout the urban area, if even possible, in order to obtain a corresponding level of service. The principles just cited bear very heavily on the quite involved analysis of alternative possibilities for accomplishing the best appropriate service to the people of Memphis in locating this particular element of the Memphis and Shelby County Street and Thoroughfare System, which only coincidentally is an element of the Interstate and Defense Highway System. Its

context for judgment as to appropriateness and adequacy of service is as an element of the Memphis and Shelby County Street and Thoroughfare System and as it relates to serving the total interests of the Memphis and Shelby County populace, both present and anticipated during the reasonable life expectancy of the Interstate element.

III.

The firm of Harland Bartholomew & Associates through its Memphis branch under my direction and supervision was called upon by various local governmental agencies to prepare additional plans and recommendations after the passage of the Interstate Highway Act. These recommendations, all of which were completed prior to the passage of the amendment affecting the taking of park lands in 1966 and amended in 1968. These studies were extremely comprehensive and were intended as a double check upon the earlier recommendations, taking into consideration any changes in the area or the habits of the populace in the ensuing years. Basically, the recommendations contained in these various studies were substantially the same in regard to the general routes of the expressway system as they had been previously. In no case has any recommendation ever been made by either me or my firm based upon the expedient that it was easier or cheaper to use routes which took park land.

In this connection, it is well to state at this time that, as shown above, our firm has been engaged on numerous occasions for the purposes of park planning; and it has been the policy of the company to recognize the great need for parks and recreational areas in all of our urban planning. It has also been the firm conviction of Harland Bartholomew & Associates, as well as myself, long prior to the passage of the aforementioned Act that the taking of park lands for road purposes or for that matter any purpose other than its use as a park should be avoided wherever it is feasible or prudent to do so.

IV.

Though the studies mentioned above contain many hundreds of pages with accompanying maps and statistical data I will attempt to condense the basic reasons which brought about the decision to recommend the location of the east-west expressway route in Memphis along the general corridor which is now being acquired and which is somewhat north of the center of the city. Basically, our long-range urban planning through the years has indicated a growth to this city which would eventually necessitate a total of more than six lanes of east-west expressway, not including those portions of the circumferential expressway which run in an east-west direction.

Experience with urban thoroughfares has fairly conclusively demonstrated that expressways should be designed with a maximum of eight through lanes. Thus when the people of an area have traffic needs which require more than six lanes in a corridor to be served, sound comprehensive planning seeks a second corridor and a spacing of parallel facilities in order not to violate the principle just espoused. This is appropriate to Memphis and reflects in the present transportation plan for the Memphis and Shelby County area. The plan includes a second internal east-west expressway along Southern Avenue and paralleling the Southern Railroad, generally coursing the entire east-west distance through the city. It is the south-of-center equivalent of Interstate Route 40 which is the north-of-center facility element of the total system necessary to meet the desire not to exceed six lanes per expressway if possible while keeping the expressway appropriately related to a total system. In other words, a northern east-west route and a southern east-west route is what, in our opinion, proper long-range planning indicates. Our feasibility studies and the present traffic flow along with that which could be reasonably anticipated in the near future showed that the northern east-west route should be built first. Sound planning also most strongly indicates the need for this route to

be near and south of the major arterial road of Summer-North Parkway (the northern boundary of Overton Park). The present transportation plan includes both.

V.

On the basis of all of the studies which have been made by both me personally and under my supervision and based upon my own personal knowledge and experience in this field, it is my considered opinion that it would have been neither feasible nor prudent to have placed the east-west route of the expressway at any other location. In other words, as explained above, the alignment recommended in my opinion, the most feasible and prudent of all reasonable alternatives possible. As a matter of fact, my firm made a study in June 1958 entitled "Alternate Location Studies - F.A.I. 505, Memphis and Shelby County, Tennessee," and it was "recommended that there be no change in the alignment," which is involved here.

VI.

Though neither I nor my firm has participated in the actual design or study work regarding the suggested alternatives which have come to the fore since so many major portions of the east-west route have either been acquired or under construction; that is, the two plans which in simple terms loop around the Park area to the north or the south, I have followed their progression with great interest. It would likewise be my considered opinion that neither of these alternatives would be feasible or prudent when compared with the proposed route through the Park, especially in view of the great care which has been taken to minimize all possible harm to the Park.

I have read the affidavit of Mr. Robert Conradt, which I understand has been filed in this cause. In general terms, he states that a number of considerations of a comprehensive type should be made and that they should be made

utilizing the services of a multi-disciplinary team. Being careful to limit the extent of his observation to that of a visit to Memphis and to referencing himself to two reports, both of which postdated the in-put essentials to route determination in this instance, he stated that many considerations were timely, appropriate, and pertinent to the question of such a location; I agreed with Mr. Conradt, but only with emphasis that all such considerations as those he has set forth as being appropriate, plus many more which he would be well to advise himself of in the past documented history of this question, have long ago been made and were indeed made, validated and revalidated up to the present time in the fullest context of comprehensive urban planning which seeks considerations to achieve an optimized environment; in short, the best possible place for people to live, to work, to pursue happiness with maximum safety, amenity and economy. As I have observed elsewhere herein, everything is related to everything else. A comprehensive city planner realizes this and uses this. We did.

I would speak to the point of one other remark in Mr. Conradt's affidavit, that being his remark that "only after such an analysis could a prudent selection be made from the various alternatives"—I agree with that observation and emphasize that we have already made such analyses in great depth, utilizing our own experienced multi-disciplinary teams and requiring man decades to accomplish. My disagreement lies with his suggestion that a matter as intrinsically complex as the question of this location within the full urban context of Memphis with proper consideration of all affected systems could be done in a period of from 60 to 90 days.

Mr. Conradt again in generalities raised the question of altering density along the route, inserting transit and the like; to this I would be derelict not to respond by observing that the official alignment for this route has been set since its inclusion in the 1955 comprehensive city plan, and that subsequent plans, both public and private, with reference to land and investments, have presumed this location.

I question not giving in depth and careful consideration to that degree of involvement of the public and private sector of what they have long presumed a decision long ago made. As a specific example, the long-range land use plan for the future development and redevelopment of the Memphis urban area presumes a number of new urban centers with very careful comprehensive consideration of density alterations in the fullest context of that comprehensive long-range Memphis land use plan; this is a very different context in my opinion from that of changing density in conjunction with a localized alignment alteration to achieve a single purpose.

/s/ William S. Pollard, Jr.

Sworn to and subscribed before me, this the 19th day of February, 1970.

Notary Public

My commission expires:
9/30/72

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF TENNESSEE

[Caption Omitted in Printing]

**AFFIDAVIT OF HAL S. LEWIS, ON BEHALF
OF CHARLES W. SPEIGHT, COMMISSIONER,
TENNESSEE DEPARTMENT OF HIGHWAYS**

STATE OF TENNESSEE
COUNTY OF SHELBY

I, HAL S. LEWIS, being first duly sworn, make oath to
the following facts:

I

I am a resident citizen of Memphis, Shelby County, Tennessee, having resided here 29 years. Since the year 1945 I have been the Executive Director of the Memphis Park Commission, with the general responsibility of the maintenance and supervision of all the parks in the city of Memphis, including the facilities thereon. I am also responsible for future planning with respect to the need for and location of new parks. I am directly responsible to the Memphis Park Commission, whose members are appointed by and responsible to the Mayor and the City Council. In the performance of my duties, I necessarily seek advice from and coordinate my efforts with other branches of the City government, such as the Memphis and Shelby County Planning Commission and the City Engineering Department.

II

The City Park System now comprises approximately 4,700 acres, of which Overton Park, consisting of 357 acres is a part. In addition to approximately 150 acres of unimproved wooded areas, Overton Park contains a golf course,

an art academy, an art gallery, a large zoo, an open air theater, playgrounds for small children, playing and practice fields, a small lake, and picnic areas. There are a number of roads throughout the Park and various parking areas to accommodate the users of the facilities described above.

I have been intimately familiar with this Park for a great many years, both in my official capacity and as a citizen and user of the benefits of the Park. I have also been familiar, since the very beginnings of the controversy surrounding the possible building of the expressway through this park, with all the many phases of the matter, including its effect on the Park, both from an aesthetic standpoint and the useability of the Park and its many facilities after the completion of the construction of the expressway. I participated in the negotiations between the city of Memphis and the state of Tennessee for the purchase of the right-of-way which culminated in the payment by the state of Tennessee of approximately \$2,209,000. During these negotiations, it was a part of my responsibility to determine exactly which facilities might be affected by the expressway and to what extent. It was also a part of my responsibility to determine which facilities might be damaged or require relocation, and what would be the exact cost to the Park Commission to repair or relocate same in other portions of the Park so that the building of the expressway would not cause the loss of any facility or the use thereof. In this latter connection, I, together with the employees of the Park Commission, the City Engineer's Office and the Tennessee Highway Department, have coordinated our efforts to see that there was all possible planning to minimize harm to the Park and the recreational areas contained therein. It has also been one of my duties to aid the Park Commission in complying with a recently-enacted City ordinance which requires that funds received from the sale of park lands can be used by the city of Memphis only for the purpose of acquiring additional land for park purposes.

III

As part of the above-outlined duties, I consulted with experts in the field of zoos and zoo planning, who advised that a suitable plan for the present and future needs of the Zoo could be devised within the confines of the present zoo area to the north of the bus line, or by utilizing available park land to the east of the Zoo and north of the bus line. Such a plan was devised and has already been implemented by the construction of some new facilities within the Zoo, such as an Aoudad mountain for goats and monkeys, a new concession stand and restroom, a Great Ape house, a sea lion pool, a snake house, an African veldt, seven moats for giraffes, antelopes and the like, and new sewers and utilities in the aggregate of approximately \$1,300,000. Future expansion and remodeling plans over the next few years for the Zoo call for the additional expenditure of approximately \$2,700,000 for future Zoo capital improvements, some of which are now being designed. There is ample land to the east, which does not now contain any improvements, to satisfy the foreseeable future requirements of the Zoo. Expansion of the Zoo to the south was hampered prior to any consideration of the expressway by the bus line previously mentioned, and the existence of very valuable private homes situated south of Galloway and east of McLean. It should be noted that this bus line is of a nonaccess type which cannot be used by any other vehicles. Pedestrians are permitted to cross this concrete strip, which is at grade level and approximately 25 feet in width, at the southern entrance to the Zoo and at park roads which cross it at grade level farther to the east.

The program conceived and approved by the Park Commission would allow for a pedestrian overpass at the southern entrance to the Zoo and one bridge to the east to avoid severing a park road which leads from the southern portion of the Park to the eastern entrance of the Zoo. The possibility of additional crossings of the proposed expressway depression has been considered in the past, but rejected for

traffic flow reasons which have nothing to do with the expressway.

The state of Tennessee has generally left the design of the pedestrian overpass to the Park Commission and the City Engineer. The structure will be without steps, and any grades will be handled with ramps to permit its easy accessibility by wheelchairs, bicycles, baby carriages and strollers. No bicycles or automobiles are now allowed in the Zoo. There will, of course, be no danger from traffic, as with the bus line, and the overpass will contain adequate guard rails and screens to prevent anyone falling therefrom. It will also be designed, as much as possible, to blend in with the present architecture of the Zoo entrance.

The bridge structure will also contain guard rails and, in addition, will contain sidewalks, since pedestrians now also use this crossing at the bus line, but now either walk in the roadway or on the shoulder of the road.

Naturally, in the many discussions and negotiations, proper provision has been made for all drainage of all natural creeks and ditches running through the Park, as well as the Zoo. There should be no damage of any kind as a result of the construction in this respect. As is to be expected, the construction of the expressway will necessitate the relocation of some utility services, such as sewers, gas mains and water lines, all of which items have been taken into consideration. All such services will be relocated, with no loss of their utility or effectiveness.

On the south side of the proposed right-of-way there now exists the parking area for the users of the southern entrance to the Zoo (the only other entrance for the public being at the east end, where parking is not affected), a playground for small children, an area used for playing fields or practice fields, a small lake and one of several picnic areas. The parking areas will be extended southwardly, and the playground will be relocated in another area of the Park. The picnic area and the playing field will be extended so there will be no appreciable loss of their functions and,

at the same time, no other facility of the Park will be affected or eliminated. The lake will not be touched. All relocation of items or construction outside the right-of-way or easements to be acquired by the State for construction purposes will be done or supervised either by me or representatives of the Park Commission to insure that such work will be done in a good and workmanlike manner, and that the natural beauty of the areas can be preserved, i.e., trees will be left in and around parking areas whenever possible.

A great deal of time and attention has been focused on the landscaping of the shoulders and median strip of the expressway, in addition to having the right-of-way depressed to its very limit in order to preserve the natural drainage of the creeks and ditches in the Zoo and Park, eliminating from view, as much as possible, the vehicles on the road and dampening any noise they might produce. Trees and shrubs, to be provided for in the State's construction costs, are to be chosen to compliment the existing natural foliage of the Park.

As a further part of my planning duties, both before and during negotiations over the project with the State, it was determined that, as an ounce of precaution, a natural embankment should be constructed along the north edge of the right-of-way, which is also the south edge of the Zoo, now separated from the rest of the Park by a fence. The purpose of this berm is to increase the effectiveness of the noise and aesthetic control created by the depressing of the roadway itself.

As an example of the extent to which all parties have developed the program is the fact that the State has agreed, through negotiations, and at its cost, to extend a culvert beyond the right-of-way so that it would serve as a bridge over an existing creek or ditch in the Zoo for a miniature train route projected in the future.

Other possibilities, such as a tunnel, have been considered and rejected by the City Engineer as impractical because of health or safety hazards that might be created in the event

pumping, lighting or ventilating equipment failed to function.

As with all expressways, the right-of-way will be completely fenced so there will be no danger of visitors, and especially children, being injured by getting on the roadway.

IV

After all the items above described were given careful study, it was next determined, through the retention of highly-qualified real estate experts, how negotiations should proceed insofar as the fair cash market value of the property is concerned. In all, the taking will comprise approximately 26 acres, of which about 23 acres are for the non-access part of the expressway. The remainder is to permit the State to relocate a park road and build the pedestrian overpass and foot bridge previously mentioned.

A careful analysis revealed that \$2,000,000 was an acceptable figure for the land taken, with which the Park Commission would be required to purchase, under the ordinance explained above, additional park lands. At the time of the preparation of this affidavit, a 160-acre tract containing a golf course and other valuable improvements has been purchased with a portion of the funds received from the State in the approximate amount of \$1,000,000. It is anticipated that at least this same amount of acreage can be purchased with the remaining \$1,000,000. In other words, an area almost the size of Overton Park can be added to the System for the 26 acres lost, a part of which was used by the bus line to begin with. In addition, the new park lands can be acquired in areas of new growth and can serve citizens of Memphis who do not live as near to Overton Park as do others.

V

In addition to the \$2,000,000 agreed upon between the City and the State as being the fair cash market value of the property taken, the additional sum of \$209,149.00 was paid by the State, after extensive and detailed negotiations. This sum was arrived at in the following manner: I first reviewed all the items of possible cost, as outlined above, which would require an expenditure of funds in order to relocate or rebuild the affected facility, so that it would be at least as good as the old one. This included a relocation of utilities, new parking areas, new playground areas, some drainage work, new east entrance and ticket booth to the Zoo, the construction of the earth berm, and relocation of the portion of the picnic area taken, along with the construction of a new pavilion in this area.

The cost figures were arrived at after careful consideration and investigation. Outside independent sources were consulted where necessary. These costs totaled the figure mentioned above, and were approved both by the Park Commission and the Mayor and City Council, as evidenced by Exhibit "A" attached to this affidavit, being a copy of a resolution of the City Council approving the final agreement negotiated between counsel for the Park Commission and the State of Tennessee. Since that time, full payment has been received, and a deed to the required property has been delivered to the Tennessee Highway Department.

VI

After a careful consideration of all factors, as outlined above, although I would have preferred that the route not be through the Park, it is my belief and opinion that not only have all things been done which will insure the minimizing of damage to the Park and recreation areas, but also that the practical use of all facilities now contained in the

Park or the Park itself will not be substantially affected by the expressway.

THIS, the 17th day of February, 1970.

/s/ Hal S. Lewis

Sworn to and subscribed before me, this the 17th day of February, 1970.

Notary Public

My commission expires:

July 3, 1972

MEMPHIS PARK COMMISSION RESOLUTION

BE IT RESOLVED, that the Memphis Park Commission, being aware of the pending suit in the United States District Court for the Western Division of Tennessee known as Citizens to Protect Overton Park, Inc., et al., v. John A. Volpe, Secretary, Department of Transportation, et al., Civil Action No. C-70-17, does hereby by this resolution wish to go on record in regard to the following facts:

1. That said Commission through the aid of its executive director, Hal S. Lewis, has kept abreast of all developments, designs and changes regarding the proposed expressway route through Overton Park over a period of at least several years.
2. That said Commission has received the fullest cooperation in obtaining information as well as the consideration and implementation of its suggestions from the City Engineer of the City of Memphis and the Tennessee Department of Highways and its representatives.
3. That said Commission on several occasions of more than a year ago adopted resolutions opposing the expressway going through any part of Overton Park. The governing bodies of the City of Memphis,—the Mayor and City

Council and their predecessors,—held exhaustive public hearings and concluded officially in behalf of the City of Memphis that the only feasible route for the expressway included going through Overton Park along the same general line as the public transportation right of way, which has gone through Overton Park for the past many years and has been used by buses and the public transit system. When the decision was reached by the City and announced as final, the Memphis Park Commission bent its every effort to work out a feasible plan which would inflict a minimum of damage upon the Park and the facilities in use. Through the full cooperation of the State of Tennessee, this has been accomplished. The zoo and its parking area have been relocated and reconstructed so as to be substantially as desirable and as usable as the earlier zoo location, and the work has been largely completed. The other principal facilities in the Park will be untouched and unharmed. This includes baseball diamonds, golf course, picnic grounds, Art Gallery, Art Academy, football fields, playgrounds, and playground equipment.

4. That said Commission is in full approval of the present design as being the most practical after full consideration of all factors such as safety and utility to the public as a whole, but more important to this Commission—that the design includes all possible planning to minimize harm to the park and the recreational areas contained therein.

5. That the Commission is in full approval of the agreement already consummated between the City of Memphis and the State of Tennessee whereby, in addition to the sum of \$2,000,000 which the City of Memphis has received for the land taken, an additional sum of \$209,000 was received to enable the Commission to either relocate or repair any damage or harm that might be done by the building of the expressway to the end that no facility in the park or the use thereof by the general public might be lost. That the costs of these various items was arrived at after careful consideration and should be sufficient to accomplish the ends intended.

6. That the City of Memphis and this Commission is required by law to use the above mentioned \$2,000,000 for the purchase of additional park land. To that end a 160-acre golf course and park area has already been acquired for the approximate sum of \$1,000,000. That additional park land will be purchased with the remaining \$1,000,000.

7. That the Commission has adopted a master plan for the improvement and expansion of the zoo, which contemplates the existence of the expressway under its present design, and which plan has already been implemented by the expenditure of approximately \$1,300,000 for projects recently completed or under construction with an additional expenditure in the future anticipated in the approximate amount of \$2,700,000.

8. That it is the opinion and belief of this Commission, after a careful consideration of all factors involved, that the use of the park or any of its facilities by the general public will not be substantially or materially affected by the building of the expressway under the design as now proposed.

I hereby certify that this is a true and correct copy of a Resolution duly adopted by the Memphis Park Commission on February 19, 1970.

/s/ R. R. Smyth
Secretary

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF TENNESSEE

[Caption Omitted in Printing]

**AFFIDAVIT OF THOMAS E. MAXSON, CITY
ENGINEER OF THE CITY OF MEMPHIS, FILED
ON BEHALF OF CHARLES W. SPEIGHT, COM-
MISSIONER, TENNESSEE DEPARTMENT OF
HIGHWAYS**

STATE OF TENNESSEE
COUNTY OF SHELBY

I, Thomas E. Maxson, do hereby state on oath the following facts:

I.

That I am 68 years of age and have been a resident citizen of Memphis, Shelby County, Tennessee, since 1924. That I have been employed in the City Engineer's office for a total of 45 years and have been the City Engineer since 1962. That as City Engineer it is a part of my responsibility to approve of all drainage facilities to be constructed in the City of Memphis, both public or private; and to determine, among other things, the safety or health hazards which might be resultant in any improper or impracticable construction. It is further one of the responsibilities of the department of which I am in charge to approve the design and grade of any new street constructed within this city. That in such capacity I have become familiar with the particular terrain of this geographical location, the flood conditions and the likelihood thereof, the annual rainfall, as well as other factors which would have a proper bearing on sound engineering decisions concerning the above duties.

II.

That I am extremely familiar with the present proposed route of the expressway through Overton Park as I have participated over a number of years in numerous meetings, conferences, discussions, and public hearings on behalf of the City of Memphis. The City of Memphis through my department has cooperated fully with the Tennessee Highway Department which has, in turn, been fully cooperative. My department has assisted the Memphis Park Commission in its deliberations regarding this project and has given fully of its judgment to all involved concerning engineering problems that may be encountered with the proposed design or other proposed designs in the past.

III.

That the drainage of the Park, especially in the Lick Creek area, has been of particular interest to me, and I have consulted frequently with representatives of the State Highway Department in this regard. Lick Creek is a natural drainage channel which now runs through the approximate center of the Park near the present southern entrance to the zoo. This creek now drains a rather large area and could cause considerable damage to the zoo and surrounding residential areas if it were obstructed during a period of heavy rainfall. At the present time, it drains naturally.

The present design of the expressway which must cross this creek provides that the creek will not be obstructed and will continue to drain naturally under the road itself in much the same fashion as now provided where it is crossed by the existing bus line. The expressway cannot be depressed any more at this point without obstructing this natural flow. The roadway will be depressed considerably below grade level at all other points as it passes through the Park.

There are several possible though, in my judgment, impracticable methods of taking care of this drainage in the

event the roadway was depressed any more at this point. All of these methods suggested have been seriously considered by both my department and the State Highway Department on many occasions, and the design now approved requiring natural drainage has been accepted by both departments as being the most practical in terms of safety and its likelihood to doing the minimum amount of harm to the Park and its recreational areas as well as the expressway and surrounding portions of the city.

Of the other methods suggested, the most common one mentioned is to build a pumping station at the site to actually pump the water as it passes under the road up the other side where it can rejoin its natural course. There is only one other such facility in this city, and its size is so small in comparison to the enormous station which would be required at Lick Creek that no real value to this inquiry can be obtained by comparing the two. Aside from the fact that constant maintenance would be required, it would be an essential requirement that an auxiliary source of power be provided for the pumps in the event of power failure. These extra facilities would have to be put somewhere which would, in all probability, require the taking of additional park land for this purpose. A reservoir has also been considered in this connection in order to reduce the size of the pumping facility, but it would require the use of a considerable amount of park land far beyond any small value that might be gained by depressing the road further at this point. It should be remembered that in spite of all precautions machinery can fail. It is self-evident that severe flooding could occur in such a case and do considerable harm to the Park and zoo, not to mention the fact that all traffic on the expressway system would be stopped. It is not inconceivable that such a situation could cause serious accidents.

As an alternative solution to mechanical pumps, it has been suggested that some form of inverted siphon be used. There is no such apparatus in use for storm drainage in the city of Memphis, and I would be very hesitant to approve

its use under any circumstances. Not only must a portion be constantly kept full of water or pumps installed to clear it after every use, but it must be kept clear of debris at all times and inspected after every rainfall. There would also be some danger in regard to such a device which, in my opinion, would not be practical in view of the large volume of water that must be carried away at this point. Any water left in the siphon would be a potential breeding place for malaria mosquitoes.

The same problems outlined above, in addition to several others, were encountered in our consideration of a tunnel for the expressway. Here again, some means other than natural drainage would have to be maintained constantly. The other problems encountered with a tunnel of this length (over 4,000 feet) concern the need for an enormous forced air ventilating system which, if inoperative, could cause fatal consequences. The tunnel would, of course, have to be illuminated and, in all probability, would have to be manned by police personnel to warn motorists of accidents and other problems which might arise in the tunnel and which could not be seen from the entrances. Though cost has not been a factor in any of my decisions, it can be seen that such a facility could only be constructed at an enormous cost to the general public. As a matter of fact, all of the above suggested alternatives could only be accomplished at considerably more cost than the proposed design, not to mention the additional constant maintenance and inspections required. It should also be added that the

construction of a tunnel facility might require the destruction of a great deal more of the large trees now in the general vicinity of the right-of-way.

/s/ Thomas E. Maxson, City Engineer
City of Memphis

Sworn to and subscribed before me, this the 17th day of February, 1970.

Notary Public

My commission expires:

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF TENNESSEE

[Caption Omitted in Printing]

**AFFIDAVIT OF HENRY LOEB, MAYOR OF
THE CITY OF MEMPHIS, FILED ON BEHALF
OF CHARLES W. SPEIGHT, COMMISSIONER,
TENNESSEE DEPARTMENT OF HIGHWAYS**

STATE OF TENNESSEE
COUNTY OF SHELBY

I, Henry Loeb, do hereby make oath to the following facts:

I.

That I am 49 years of age and have been a resident citizen of Memphis, Shelby County, Tennessee, my entire life. That at the present time I am the duly elected and acting Mayor of the City of Memphis. That prior to having been

elected Mayor on this occasion, I was elected to that position for a previous term of office. That I have also served in other elected capacities in the government of the city of Memphis and was, in addition, an active serving member of the Memphis Park Commission for a number of years.

II.

That both as a citizen of this city and in my official capacity, I have closely followed the developments over a number of years of both the selection of the general route for this section of the east-west expressway which is proposed through Overton Park, as well as the specific design of the project itself in the Park. That I have, in all my deliberations concerning this project, attempted to consider all pertinent factors such as harm to the Park and its facilities, the traffic needs of the community, the effect of alternate routes in terms of these traffic needs and the disruption of the populace and their environment; and on the whole, all things which I believed had any bearing upon the health, safety and general welfare of the people whom I represent. That in making these considerations and my final judgment, I have had the benefit of advice from all departments of the City which might be helpful as well as the fullest cooperation of the Department of Highways of the State of Tennessee.

III.

Based upon these considerations, it is my opinion that the route now proposed is the most feasible and prudent of all the alternatives, and that all possible planning has been done to minimize harm to the Park and the recreational areas contained therein. It is further my opinion that the use of the Park or its facilities will not be substantially or materially affected by the proposed expressway.

It is further my strong feeling, made after the most careful analysis, that any further delay in the completion of this

project will do irreparable damage and harm to the proper growth and progress of this City.

/s/ Henry Loeb, Mayor
City of Memphis

Sworn to and subscribed before me, this the 17th day of February, 1970.

Notary Public

My commission expires:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

[Caption Omitted in Printing]

**AFFIDAVIT OF VIRGIL A. RAWLINGS, FILED
ON BEHALF OF CHARLES W. SPEIGHT, COM-
MISSIONER, STATE OF TENNESSEE, DEPART-
MENT OF HIGHWAYS**

STATE OF TENNESSEE
COUNTY OF SHELBY

I, Virgil A. Rawlings, being first duly sworn, make oath to the following facts:

I.

I am 57 years old and a resident citizen of Memphis, Shelby County, Tennessee, having resided in said city and county my entire life. I have been an employee of the Tennessee Department of Highways in various capacities for a period of 25 years. At the present time, I hold the position of Regional Right-of-Way Engineer, and have been employed in that capacity since 1966. My duties and

responsibilities generally consist of supervising the numerous phases of work for the acquisition of all rights-of-way for the expressway system in Tennessee from the Tennessee River westwardly, although the major portion of my time is spent with the work in Shelby County. As part of my duties, it was necessary that I become familiar with that portion of Project I-40-1(90)3, which includes the proposed right-of-way through the area known as Overton Park. In addition to the familiarity and knowledge which I have acquired over a number of years in my official capacity, I have been a frequent visitor to the Park for recreational purposes. It is also a part of my responsibility to be familiar with the details of the right-of-way and parcel plans and plats. In this project, the taking through Overton Park is designated as parcel No. 307, and there is attached to this affidavit as Exhibit "A" thereto the entire parcel plat for the Overton Park acquisition. This plat has been revised a number of times, but has basically required the right-of-way shown in Exhibit "A" since 1967. There have been numerous design changes in the actual construction plans both before and since the date of Exhibit "A," but the design changes since 1967 have not required any substantial change in the taking. Exhibit "A" reflects all revisions through July 3, 1969.

The entire route for the east-west expressway of which the above numbered parcel covering Overton Park is a part is approximately 12 miles in length and runs generally from Front Street at the Mississippi River on the west to the White Station Road Interchange on the eastern edge of the city. In this right-of-way there are approximately 1687 separate parcels of real property and over 1400 of them were improved by structures of some kind such as residences, stores, or buildings of an industrial nature. As of the date of the signing of this affidavit, the State of Tennessee has already acquired either ownership or legal possession of all of said parcels with the exception of only two and approximately seven small easement areas by either negotiation or eminent domain proceedings. Furthermore, all

of the structures have been demolished or are in the process thereof. Lastly, all but a handful of the occupants of these parcels have been relocated. Some portions of this right-of-way are already under construction and in the process of completion.

II.

As can be seen from Exhibit "A" the total area of Overton Park is approximately 357 acres. The area to be taken in fee by the State of Tennessee totals 26.4 acres. However, only 23.2 acres will comprise the area to be used for the actual right-of-way which will be access controlled. The remaining 3.2 acres will be taken primarily to enable the State to have sufficient ground to build the pedestrian overpass and bridge structure which I will explain in detail in this affidavit. A portion of this 3.2 acres will also be used to relocate small portions of park roads. There is also a 1.45 acre easement area which is to be taken for the purpose of improving drainage facilities and for slope maintenance. As can be seen on Exhibit "A" the proposed right-of-way is superimposed over facilities existing in the area taken. The nonaccess bus line now used by the Memphis Transit Authority diesel-electric buses only can clearly be seen running the entire width of the Park in an easterly direction from Parkview Street to East Parkway at its intersection with Broad Avenue. This bus route, which is similar to a two-lane paved highway, is an easement 50 feet wide which comprises approximately 4-1/2 acres of the 23.2 acres mentioned above.

At the present time, three park roads cross this bus line at grade level. The present southern entrance to the municipal zoo is approximately 250 feet east of the eastern boundary of Parkview Street and is reached by visitors who must go on foot from the parking area across the bus line. The only other entrance to the zoo for the members of the general public is at its eastern entrance and its adjacent parking facilities will not be affected by the expressway.

To accommodate the visitors who wish to enter the zoo from the southern entrance provision has been made of a pedestrian overpass. The design of this overpass has been generally left to the discretion of the Memphis Park Commission to insure that it will serve its needs and blend in aesthetically with their proposed new entranceway, the Park, and the zoo itself. It will, however, according to my understanding, based upon information and belief, be a structure sufficiently wide to permit the smooth flow of pedestrian traffic with all changes in grade to be made through ramps rather than steps. It will also have ample guard rails and other safety features to protect its users, especially small children.

During the many conferences through the years regarding the crossing of the right-of-way in other places than the pedestrian overpass, the number of such crossings, and their design have also been generally left in the discretion of the Memphis Park Commission. The present design which calls for one vehicular bridge crossing the right-of-way as shown on Exhibit "A" meets with the full approval of the Memphis Park Commission and its desires regarding its traffic flow for its eastern entrance to the zoo. It has never been the desire of the Memphis Park Commission, as I understand it, to encourage through traffic through the Park. This bridge structure will, of course, be over the expressway and both vehicular and pedestrian traffic using it will not face the present dangers existing at the bus line grade crossing. This bridge structure will have sidewalks for the pedestrians with proper guard rails.

III.

The expressway itself will follow similar designs as now exist in the city of Memphis with opposing lanes of traffic separated by a median strip. The roadway itself will be depressed below the natural contour of existing ground westwardly from Lick Creek to McLean and eastwardly from Lick Creek to East Parkway. Only at Lick Creek will

the roadway approach grade level. The reason for this design is due to the fact that proper drainage must be provided for Lick Creek, especially during periods of heavy rainfall. Under the present design, Lick Creek and the land area of the Park which drains into it will continue to drain in its natural fashion. If the roadway were depressed any further in the Lick Creek area, drainage would have to be accomplished by a mechanical means. This would mean simply that a permanent pumping station in all probability provided with an auxiliary power source would have to be constructed and maintained. The only other known mechanical method is what is known as an inverted siphon which must be kept clear of debris at all times. In addition, for a siphon to operate properly, a portion must be kept full of liquid; in this case, water. It is self-evident that such mechanical devices create safety and health hazards. It is my understanding, based upon information and belief, that the use of both types of mechanical devices have been considered and studied by the design department of the Tennessee Highway Department and submitted to the City Engineer of the City of Memphis, who preferred and approved the present design providing for natural drainage.

The right-of-way for the controlled access portion of the taking will be completely fenced, so that no person, vehicle or animal can cross the right-of-way except at the designated places described above.

The purpose of depressing the roadway is to eliminate as much as possible any view of moving traffic to the users of the Park as well as noise from moving traffic. It is to be noted, however, that the zoo is bounded along its entire northern boundary by a major thoroughfare known as North Parkway. The Park itself, in addition to North Parkway, is bounded by two other major traffic arteries—East Parkway on the east and Poplar Avenue on the south.

IV.

During negotiations by our department with the City of Memphis and the Memphis Park Commission, every possible suggestion was carried out to minimize any damages or harm which might be caused by the expressway to the Park or recreational areas. Additional funds were provided and have been paid to relocate a portion of the parking facilities and playground area just south of the existing southern zoo entrance, to construct an embankment known as a berm to compensate for the lack of depression in the roadway in the area of Lick Creek, for the relocation of all utilities now serving the zoo or Park, for any drainage work which may be necessitated by the expressway, and to relocate and rebuild a portion of the picnic area and pavilion now in the east portion of the Park.

It is my opinion that the utility of the Park and the zoo and all of the facilities contained therein as well as the use of the Park and said facilities by the general public will not be substantially or materially affected by the construction of this portion of the expressway system.

VIRGIL A. RAWLINGS, Regional
Right-of-Way Engineer,
Tennessee Highway Department

Sworn to and subscribed before me this 17th day of
February, 1970.

Notary Public

AFFIDAVIT

I, Luther W. Keeler, after being duly sworn, depose and say:

I am sixty-four (64) years old and have been a licensed civil engineer for over twenty (20) years. I was State Right-of-Way Engineer for the Tennessee Highway Department

from 1961 to 1964 at which time I became Development Engineer for the Highway Department, a position which I hold at the present time. As State Right-of-Way Engineer, and, later Development Engineer, I am personally familiar with all of the events which occurred in arriving at the proposed location and development of the segment of the interstate project I-40-1(90)3 in Memphis, Tennessee, in the area of Overton Park, from 1961 to the present. By virtue of examining the file on this section of the project, many, many times, I am familiar with the events involved in this matter prior to 1961 to the extent of having examined all state documents, including correspondence, as are contained in this file.

Between the date 1957 and 1964, the State of Tennessee, Department of Highways, in cooperation with the City of Memphis and the United States Bureau of Public Roads, made studies for the selection of a location for the Interstate Highway System in the City of Memphis, including the location of Interstate Route 40 which runs easterly and westerly through Memphis. This route includes the section of highway proposed through Overton Park. In the determination of the location for Interstate Highway 40, the services of a consulting engineering firm, Harland Bartholomew and Associates, were employed and the consulting engineer furnished his location study report to the Department in August, 1958.

On March 14, 1961, a public hearing was held in the City of Memphis for the section of highway through Overton Park, (see affidavit of D. W. Moulton, attached hereto and marked Exhibit A).

On March 25, 1964, the Department employed the consultant engineering firm of Buchart-Horn, Inc., to prepare preliminary and final design plans for a section of Interstate Route 40 including the section through Overton Park. This employment was predicated on use of the location previously determined from studies which had been completed between 1957 and 1964. At this time, the Department considered

that the location had been adequately studied and reviewed and that these studies and reviews had shown that there is no feasible and prudent alternative to the use of the lands in Overton Park.

In mid-1964, the Department had knowledge of certain opposition which had arisen to the use of the route through Overton Park and in August, 1964, made a review of 2 alternate routes which appeared to be the most promising variations in location which would avoid use of Overton Park. These variations being considered involved only a relatively short section of Interstate Route 40, being only sufficient to avoid the park; one of these alternates being located immediately north of the park more or less along North Parkway and the other being immediately south of the park more or less along Poplar Avenue. This review substantiated justification of the routes as proposed by Harland Bartholomew and Associates and passing through Overton Park.

On July 2, 1965, representatives of the State of Tennessee, Department of Highways, of the Bureau of Public Roads, and officials of the City of Memphis, and engineers of the Consulting firm of Buchart-Horn held a conference in Memphis concerning the section of highway proposed through Overton Park, the purpose of this meeting being to consider the proposed design of the highway to the end of providing a design which would blend with the existing features of Overton Park and would minimize interference with park usage and activities.

In the Summer of 1965, because of the continued expressions of opposition to the proposed highway through Overton Park by certain citizens of Memphis, the Department of Highways and U.S. Bureau of Public Roads considered the extent of the complaints which had arisen and further reviewed the 2 previously studied alternate routes which would avoid Overton Park, and this review confirmed previous findings that the route through Overton Park was in the best public interest. This review was reported officially

to Mr. Rex M. Whitton, Federal Highway Administrator, in a letter dated August 23, 1965, from State Highway Commissioner, David M. Pack (see Exhibit "B" attached hereto).

In mid-1965, acting on instructions from the Department of Highways, the consultant engineering firm continued studies of design and minor refinements of location in the interest of reducing to the fullest extent practical any interference with park usage and in providing that the design would achieve a roadway which would blend with park topography. In September 1965, the consultant furnished to the Department a report of its further studies and recommended a minor change in the location through the park, which was adopted. This change was a small movement of the location northward, so that the proposed highway would be along, and would incorporate within the proposed highway the existing bus line which separated the zoo area of the park from the major park land areas to the south.

On December 9, 1965, Mr. Rex M. Whitton, Federal Highway Administrator, accompanied by Mr. E.H. Swick, Director of Right-of-Way and Location of the Bureau of Public Roads, visited the site of the highway through Overton Park and made a personal inspection of the proposed route and of the 2 alternate routes which had been previously studied for consideration of avoiding the use of Overton Park for the highway.

In a letter, dated January 17, 1966, addressed to Commissioner David M. Pack, Mr. Rex M. Whitton re-affirmed the previously given approval of the Bureau of Public Roads of the proposed location through Overton Park. By letter, dated June 15, 1966, to the State Highway Engineer, the Division Engineer of the Bureau of Public Roads concurred in the Department's proposal to proceed with the development of design, based on preliminary plans which had been prepared by Buchart-Horn, Inc. (see Exhibit C, attached hereto, which is a copy of Mr. Whitton's letter of 1/17/66, giving approval of the location).

In a letter, dated March 15, 1967, the Bureau of Public Roads authorized the Highway Department to proceed with appraisals, title search, and other incidentals preliminary to acquisition of rights-of-way on the section of Interstate Route 40, including Overton Park. On May 29, 1967, the Bureau of Public Roads authorized the Department to proceed with purchase of the right-of-way.

Throughout 1967, the opposition of certain citizens to the highway being proposed through Overton Park continued, and on February 14, 1968, Mr. Lowell K. Bridwell, Federal Highway Administrator, who succeeded Mr. Rex M. Whitton, came to Memphis and conducted a public meeting to discuss the location through Overton Park. On April 3, 1968, Mr. Bridwell held a further meeting in Memphis with the City Council, representatives of the Bureau of Public Roads, and the Highway Department to discuss the location and the design of the highway.

On June 20, 1968, the State Highway Department was advised that Mr. Lowell Bridwell had requested that alternate studies be made of the design through Overton Park for consideration of a lowered grade line. During the early part of 1968, the Bureau of Public Roads conducted independent reviews of the proposed design through Overton Park, and on July 31, 1968, transmitted preliminary plans showing a lowered grade line through Overton Park. On February 11, 1969, the Bureau of Public Roads provided to the Department a revised lowered grade line through Overton Park.

On March 25, 1969, the State Highway Department submitted to the Bureau of Public Roads revised drawings for the proposed highway through Overton Park showing the lowered grade line with proposed slope-wall treatment, and requested approval of the preliminary plans so that preparation of final construction plans could proceed.

On May 19, 1969, a design public hearing, as required by Federal Highway Law, was held in the City Council Chamber of Memphis City Hall.

Drawings showing the design for the construction of the highway were submitted to the Bureau of Public Roads on September 29, 1969, with a request for authorization to advertise for the construction of the highway through Overton Park. All rights-of-way required for the construction of the section of highway involving Overton Park have been acquired by the Department of Highways.

During the entire history of the development of the engineering for the location and design of the segment of highway involved here, the State Highway Department and the Bureau of Public Roads have made a sincere and prolonged effort to find a location which would avoid the use of the park lands without sacrifice of the over-all public interest. Being forced to the conclusion, after the foregoing exhaustive studies that there is no feasible and prudent alternative to the use of the lands in Overton Park, the State Highway Department and the Bureau of Public Roads have provided a design which will, to the most practical extent, minimize interference with park usage and activities, or depreciation of park values. For the design of the highway, the Department has employed a consultant engineering firm having wide experience and proven capability. This consultant firm is staffed with engineering personnel adequately trained and experienced in the field of landscaping and aesthetic design (see Exhibit "D", attached hereto, which consists of letters dated 10/5/65 and 4/27/66 from Buchart-Horn to the Department of Highways setting out the firm staffing for landscape design). The Department has, of course, utilized the services of its own landscape architect to review the plans development. All reasonable effort has been made to minimize the amount of park lands taken and it is the Department's overriding policy to continue to include all possible planning to minimize harm to Overton Park through all measures practically available to this end.

The design finally achieved lowers the grade of the proposed highway to the greatest extent practical, consistent with prudent provision of the necessary highway drainage,

this being controlled by the elevation of the natural drainage channels prevailing in the area. During the course of the design, consideration was given to an overhead roadway which would have the advantage of providing little or no severance of the total park area, but such an overhead roadway would have disadvantages from the standpoint of aesthetics and noise level.

Consideration was also given to the design of a tunnel section. Although such a design would have the advantage of eliminating many of the objections advanced by the plaintiffs in this law suit, the disadvantages attendant in all of the aspects of such a design, other than aesthetic, are tremendous. For instance, the section of the highway, which is under consideration in this proceeding, will operate with a full traffic load and if a tunnel were constructed there could be interference with the traffic flow because of vehicle accidents, breakdowns, fires or other causes which would tend to greatly depreciate the dependability of the highway. When such traffic stoppages occur in a tunnel, the difficulties in removing stalled or wrecked vehicles, or injured persons, are apparent. Tunnels of the length which would be required at Overton Park would require sophisticated ventilation and lighting equipment which add to the burden of the highway maintenance. The sag in the grade line of the highway for a tunnel would require provision of drainage. The breakdown of any of the maintenance equipment for such features as just listed would result in a most unsatisfactory or hazardous condition. A not-to-be overlooked disadvantage of a tunnel is the extremely high cost.

Because of the disadvantages already stated, the State has seldom constructed tunnels for its highways. Where tunnels have been provided, such have been due to more or less unavoidable conditions where natural topography made conventional open cut construction impractical almost to the point of being impossible. Existing highway tunnels in this State have been not more than about 1,000 feet in length and thus do not require ventilation, whereas, a tunnel for Overton Park would be approximately four times as long.

The last experience in tunnel construction by the State of Tennessee was a bored tunnel under Missionary Ridge in Chattanooga. The condition at Overton Park is favorable for a "cut and cover" tunnel, which construction would be substantially less costly than a bored tunnel. However, it is estimated that even a "cut and cover" tunnel under Overton Park would cost in excess of Thirty Million Dollars. If a tunnel were constructed it would be difficult if not impossible to provide a satisfactory connection with the existing City Street System at East Parkway where an interchange has been included in the design which has been prepared.

The estimated cost of construction of the section of highway through Overton Park as presently designed would be approximately Two and One-Half Million Dollars.

FURTHER DEPONENT SAYETH NOT.

/s/ Luther W. Keeler

STATE OF TENNESSEE
COUNTY OF DAVIDSON

LUTHER W. KEELER, makes oath that the foregoing affidavit is true to the best of his knowledge, information and belief.

This the 19th day of February, 1970.

/s/ Edna S. Brady
Notary Public

My Commission
Expires: 1-28-71

EXHIBIT "A"

AFFIDAVIT

I, D. W. Moulton, after being duly sworn, depose and say:

I am seventy-two (72) years old and a resident of Davidson County, Tennessee and I have been a licensed civil engineer since 1937. From January, 1959, to January, 1963, I was Commissioner of the Department of Highways of the State of Tennessee.

Having been Highway Commissioner during the period just stated, I became intimately acquainted with the situation which is involved in this legal proceeding. Among the many actions which were initiated with regard to this matter during my tenure as Commissioner of Highways, was the holding of a public hearing in connection with the location of Project I-40-1(90)3, in Shelby County in the area of Overton Park, on March 14, 1961.

While such hearings were generally conducted by the Department Attorney, in this particular instance, because of the extreme interest evidenced by the citizens of Shelby County in the location of this segment of the project, it was determined that I should conduct the hearing myself. This I did. As previously stated, the hearing took place on March 14, 1961 and lasted from 10:00 a.m., Central Standard Time until after 3:00 p.m., Central Standard Time. The hearing was schedule to be held in the County Court Room at Memphis, Tennessee and it was so commenced at 10:00 a.m. However, within a matter of minutes, it became evident that the court room was not large enough to accommodate all of those interested citizens who had come to attend the hearing.

Consequently, the hearing was adjourned and re-convened in the Municipal Auditorium. All the persons who were present at the court room when the decision to reconvene in the auditorium was made, walked the short distance from the county court room to the Municipal Auditorium. In order that no interested persons who came, late, to the

county court room to attend the hearing would miss the hearing because of its re-location, two Highway employees were stationed at the entrance to the court room until well after 11:00 a.m. to direct such persons to the new location of the hearing at the municipal auditorium.

After the hearing reconvened at the Municipal Auditorium at about 10:30 a.m. it continued without any break until well after 3:00 p.m. Present at the hearing were Mayor Henry Loeb, Mr. Rudolph Jones, Public Works Commissioner of Shelby County, Mr. Herbert Bates, State Urban Engineer of the Tennessee Highway Department, Mr. Fred Greve, Bridge Engineer, and Mr. R. S. Patton, Engineer of Design, the latter three gentlemen being officials of the Tennessee Highway Department. Attending the hearing, in addition to those last named, was Mr. William Pollard, a partner in the consulting firm of Harland, Bartholomew and Associates. Mayor Loeb, Mr. Jones, Mr. Bates and Mr. Pollard all made introductory and explanatory statements concerning the proposed design and location of the project. Also, a short film was shown which gave a visual idea of the proposed location of the project.

After the above introductory statements and film, the hearing was thrown open to questions from the audience. Every effort was made to allow any and all persons to be heard who wished to ask a question or make a statement with regard to the design or location of this segment of the project. From my personal observation, it is my opinion that everyone who wished to make a statement or ask a question did so. From the time the hearing re-convened in the auditorium, it continued without any break until after 3:00 p.m., and it was not adjourned until I had asked twice if there was any one else who wished to make any statement or ask any question with regard to the project and no reply was forthcoming.

Further this deponent sayeth.

/s/ D. W. Moulton

EXHIBIT "B"

August 23, 1965

Mr. Rex M. Whitton
Federal Highway Administrator
U.S. Department of Commerce
Washington, D.C. 20235

Dear Mr. Whitton:

Subject: Tennessee Project I-40-1(68)3, Shelby
County - Location Through Overton
Park in Memphis

About a year ago, this Department reviewed the selected location for Interstate Route 40 through Memphis to determine whether or not some modification of a section of the route could reasonably be made which would avoid crossing Overton Park. Some of the citizens of Memphis had voiced opposition to the routing through the Park. We are highly appreciative of the great value of large park areas within large cities and realize that we are all obligated to avoid destruction of such areas where reasonably possible. However, we must carefully view all of the involved factors in this case with an ultimate objective of preservation of the best public interest. The facts are that total area of Overton Park is approximately 340 acres and our proposed highway would use only approximately 20 acres. Therefore, it cannot be said that reduction in Park area is extreme in proportion. We do, however, propose to minimize the area of actual taking of Park land and also to minimize the disruptive effect on Overton Park through careful attention to location and design details.

Our engineering staff made projections for two alternate routes which appeared to have possibilities for avoiding the crossing of Overton Park. These are shown on Line "A" and Line "B", respectively, on a map of Memphis enclosed.

Estimates of the costs of acquisition of rights-of-way and construction on each of these alternate lines were prepared and were compared with the costs estimated for a comparable section of the original route passing through Overton Park. Our estimates showed that the total costs for rights-of-way and construction for Lines "A" and "B" and the original routing were as follows:

Line "A" - R/W and Construction	\$26,289,000
Line "B" - R/W and Construction	\$31,325,000
Original Line - R/W and Construction	\$17,141,000

Thus it was determined that for the items of right-of-way acquisition and construction the original line through Overton Park had a cost advantage of more than \$9,000,000 as compared with the least costly of the two possible alternates considered. It was obvious that it was strongly in the best public interest to continue with our selected routing through Overton Park. In further reviewing this situation at this time we have taken into consideration the comparative user benefits of the two alternate Lines "A" and "B" as compared with the line through Overton Park. We estimate a 1987 ADT of 80,000 and that Line "A" alternate would add approximately 3/10 mile to the travel distance and Line "B" would add approximately 15/100 mile as compared with the more direct line through Overton Park. Considering only the through Interstate traffic without considering interchange movements, it is noted that the annual user costs for the 3 lines being compared are as follows:

Line "A"	10,397,000
Line "B"	10,032,000
Original location through Overton Park	9,615,000

Thus it is seen that there is a substantial economic advantage in favor of our selected route through Overton Park in terms of users benefit. This annual savings to users in the amount of approximately \$780,000 would be reflected as an initial cost savings of \$8,970,000 as compared with Line "A" and an initial cost savings of \$4,780,000 as compared

with Line "B". Taking this element into consideration together with the comparative costs of right-of-way and construction would result in a total net economic advantage for the line through the Park in the amount of \$18,118,000 as compared with Line "B" and an advantage of \$18,964,000 as compared with Line "A".

In addition to the economic justification there are of course other important considerations which must be recognized in determination of a location in this case.

The route through Overton Park is favorable with respect to displacement of persons and destruction of property. We have made a survey and find that in this respect the original route compared with Lines "A" and "B" as shown in the following table:

Line "A"

Residential Units	771 = 3065 people
Commercial & Industrial	46 = 1300 people
Churches	3 = 75 (actually employed) 7,500 people affected
Schools	2 = 80 (actually employed) 2,000 people affected
Hospitals & Homes for Aged	1 = <u>200</u> people
Total	4720 people

Line "B"

Residential Units	428 = 1563 people
Commercial & Industrial	125 = 638 people
Churches	5 = 60 (actually employed) 4,000 people affected
Schools	3 = <u>125</u> (actually employed)
Total	2386 people

This route would cross the property of Southwestern University and would destroy valuable properties in the business area on Summer east of East Parkway.

Original Line Through Overton Park

Residential Units	412 =	2292 people
Commercial & Industrial	30 =	295 people
Churches	4 =	20 (actually employed)
		5,600 affected
Schools	None =	0
Total		2607 people

On both Lines "A" and "B" there would be destruction of many fine homes and attendant damages to adjacent valuable properties. These costs are reflected in the estimates for cost of right-of-way.

The route through the Park would minimize disruption of the existing street layout and traffic patterns. Overton Park is a large area without street crossings and consequently the streets adjacent to the Park have been important multi-lane arterial highways. These are as follows: North Parkway-Summer on the north; East Parkway on the East; and Poplar Avenue on the south. Each of these is a thoroughfare of long continuity. Our proposed route through the Park will span East Parkway with a diamond type Interchange and will not cross either Poplar or North Parkway. Line "A" would result in crossing and recrossing of Poplar Avenue and require an interchange in the vicinity of the intersection of East Parkway with Poplar Avenue. This situation would not be desirable. Line "B" would cross and recross North Parkway-Summer Avenue, and would cross East Parkway near the intersection of North Parkway-Summer which would be undesirable with respect to interchanging.

The facts described above have convinced us that it is strongly in the best public interest to continue with our intention to construct the highway through Overton Park. We have, however, continued efforts to minimize the taking of Park land and to minimize any possible reduction in recreation and aesthetic values of the Park. We have studied the possibility of moving the interchange originally planned at East Parkway to Hollywood in an effort to reduce taking of Park area. Our studies showed that it is

not advisable to move the interchange from East Parkway to Hollywood for the reason that an interchange at Hollywood would not conform with the existing city street plan and could not provide for traffic needs without reconstruction.

In continuation of our efforts toward the objectives stated above, we have recently been able to achieve two developments which promise to reduce the impact of the highway location on the Park. One of these is that arrangements appear to be possible which can permit shifting of our location a short distance northerly to move somewhat out of a particular wooded recreation area of the Park and to follow the right-of-way of a former street car line which already severs the Park area. The old street car right-of-way is presently in use solely by the Memphis Transit Authority for travel by street buses which have replaced the former street cars. It is indicated that it will be possible to remove the street buses and utilize the street car right-of-way as part of the width of the Interstate Highway. The advantages are obvious.

The other development mentioned is that we have determined that a diamond type interchange at the crossing of East Parkway at the eastern edge of Overton Park can replace the interchange originally planned with a consequential reduction of taking of Park land for interchange ramps. Our Consultant Engineer, employed to design the project, has been instructed to proceed to develop plans in accordance with the location along the old car line and with the diamond type interchange at East Parkway.

The grade elevation through Overton Park will be designed so as to require a minimum width of Park land. The planning will allow for shielding from view and noise by appropriate roadside planting. We will provide adequate pedestrian overpasses with careful design to conform with the Park setting as far as possible. Adequate vehicular separation structures will be provided for the Park roads.

We hope that the information and discussion herein will reassure you that our Department was correct in selecting the route through Overton Park and that your Department was correct in approving our route selection. We regret that some of the citizens of Memphis have voiced opposition to our location. We are in sympathy with their high regard for the value of the Park and recognize their sincerity of purpose. However, it is thought that in our position of responsibility to consider all facts involved we are impelled to proceed as planned. We believe that when the project has been constructed, the public will quickly recognize the great contribution of the facility in solving a major traffic problem in Memphis and will see that Overton Park has been affected only to a minor extent.

Yours truly,

/s/ David M. Pack
Commissioner

DMP:hf

Enclosure

cc: Mr. J. C. Cobb
Staff

[Exhibit C]

Mr. David M. Pack, Commissioner
Tennessee Department of Highways
State Highway Department Building
Corner 6th Avenue, North and
Deaderick Street
Nashville, Tennessee 37219

Dear Mr. Pack:

THROUGH:
Mr. Harry E. Stark
Regional Engineer

Mr. J.C. Cobb
Division Engineer

Thank you for your August 23, 1965 letter concerning your reevaluation of the location of Interstate Route 40 in the vicinity of Overton Park at Memphis. I appreciate the thorough manner with which your department has approached this problem. It is a matter which fully deserves the most careful and serious consideration.

Since receiving your letter I have had our staff here and in our Atlanta and Nashville offices again make a thorough and deliberate review of the whole situation, which has now been completed. I have gone over with them their findings as well as reviewed the material made available by you and others. I have also made myself and our staff available to meet with anyone who has expressed an interest and we have met with a number of people to receive their views and discuss the matter.

We find that the Tennessee Department of Highways has given adequate study and developed sufficient information to properly define the problem and on which to base a decision. We find nothing pertinent to this matter which you have not taken into consideration. Your conclusion that the location through the northern part of Overton Park represents the proper balance of the various factors involved in this area is well founded. We can offer no objections to your decision and reaffirm our previous approval of this location.

I have noted with special interest your remarks concerning the design of the highway through the Park area, particularly the aesthetic aspects. I strongly indorse the most exacting efforts to assure a finished product which is in keeping with the area and future Park usage. We consider this to be absolutely essential and for added emphasis make it a condition to our action. We ask that the design be subjected to continuous evaluation by qualified architectural landscape personnel as it progresses. The aesthetic elements should be fully coordinated with the appropriate city park officials so that a mutually acceptable plan is achieved.

Sincerely yours,

/s/ Rex M. Whitton
Federal Highway Administrator

[Exhibit D]

September 2, 1965

Mr. John C. Cobb
Division Engineer
Bureau of Public Roads
Nashville, Tennessee

Dear Mr. Cobb:

Subject: Project I-40-1(68)3, Shelby County--Location
in Vicinity of Overton Park

In your letter of April 14, 1965, addressed to Mr. W. E. Dunlap, you requested 3 copies of maps and other supporting data in connection with cost estimates furnished in a letter from Mr. L. T. Cantrell to Commissioner David M. Pack dated August 28, 1964. In recent weeks you and members of your engineering staff have reviewed with us the data in our office which were used to arrive at the figures given in Mr. Cantrell's letter. On August 23, 1965, Commissioner Pack addressed a letter to Mr. Rex Whitton of the U.S. Bureau of Public Roads in Washington which summarized our studies of the location of Interstate Route 40 in the vicinity of Overton Park. This letter incorporated the figures given in Mr. Cantrell's letter of August 28, 1964, except that the totals omitted the E&C increments which had been included in the totals in Mr. Cantrell's letter. Also, Commissioner Pack's letter included consideration of user benefits in arriving at a higher estimate of the economic advantages of the original route through Overton Park as compared with Alternate Lines "A" and "B". These alternate routes would miss Overton Park to the south or to the north.

In our present review of these estimates we have discovered that the estimates made and reported in Mr. Cantrell's letter of August 28, 1964, and in Commissioner Pack's recent letter to Mr. Whitton were not based on exactly comparable lengths of the three lines on which estimates

were furnished. This was due to failure to use a common beginning point for the routes being compared. The difference in beginning points was small and no significant amounts of cost were involved insofar as these comparative estimates are concerned. However, in order to properly document our records we have made adjustments to the cost estimates for the 3 lines being compared and the final adjusted estimate figures are given below for your records in tabulated form.

	1964 Estimates—(Uneven Beginning Points)		1965 Adjusted Estimates Garland to Holmes (For Common Beginning Point)		
	ROW	*CONST.	ROW	*CONST.	ROW & CONST.
Original Line Through Park	9,042,000	8,099,000	9,641,000	8,510,000	18,151,000
Line "A"	18,000,000	8,289,000	17,814,000	9,461,220	27,275,220
Line "B"	23,350,000	7,975,000	23,350,000	9,139,320	32,489,320

*Not including E&C increments which were included in Mr. Cantrell's letter of August 28, 1964.

Comparing the figures in the last column above with the figures given in Commissioner Pack's letter of August 23, 1965, we note that after adjusting for a common beginning point we have some higher costs for both Line "A" and the original route through the Park. These increases are practically equal however and do not affect our statement of conclusion that "for the items of right-of-way and construction the original line through Overton Park had a cost advantage of more than \$9,000,000 as compared with the least costly of the two possible alternates considered."

We are attaching hereto one copy of the following:

- A. The report and estimate of cost of rights-of-way on Lines "A" and "B" in pamphlet form.
- B. The sheets taken from the 104(b)5 study which are the basis of the right-of-way costs for the line through Overton Park.
- C. The computations made to determine the cost of construction on the lines being compared.

These show the original basis used in 1964 figures and also the figures as adjusted in 1965 to reflect a common point of beginning.

As you know, we used large aerial photographs to project the locations of the Lines "A" and "B" for purposes of this study. These are on file in our offices for your use as needed. We will, however, within the next few days supply you with reduced size copies of these photographs for your records. Please advise if anything further is needed in connection with this study.

Yours truly,

L.W. Keeler
Development Engineer

LWK:hf

Enclosures

cc: Com. David M. Pack; Staff
Mr. L.M. Bare; Mr. R.S. Patton
Mr. J.K. Bilbrey; Mr. C.E. Greek

October 5, 1965

Mr. H. O. Boyd
Special Projects Engineer
Tennessee Dept. of Highways
Nashville, Tennessee

Dear Mr. Boyd:

In our recent meetings with the State and Bureau of Public Roads representatives, there have been discussions of developing landscaping on portions of I-40 in Memphis. The idea was also expressed that it would be desirable to have the design consultant on the project do this landscaping.

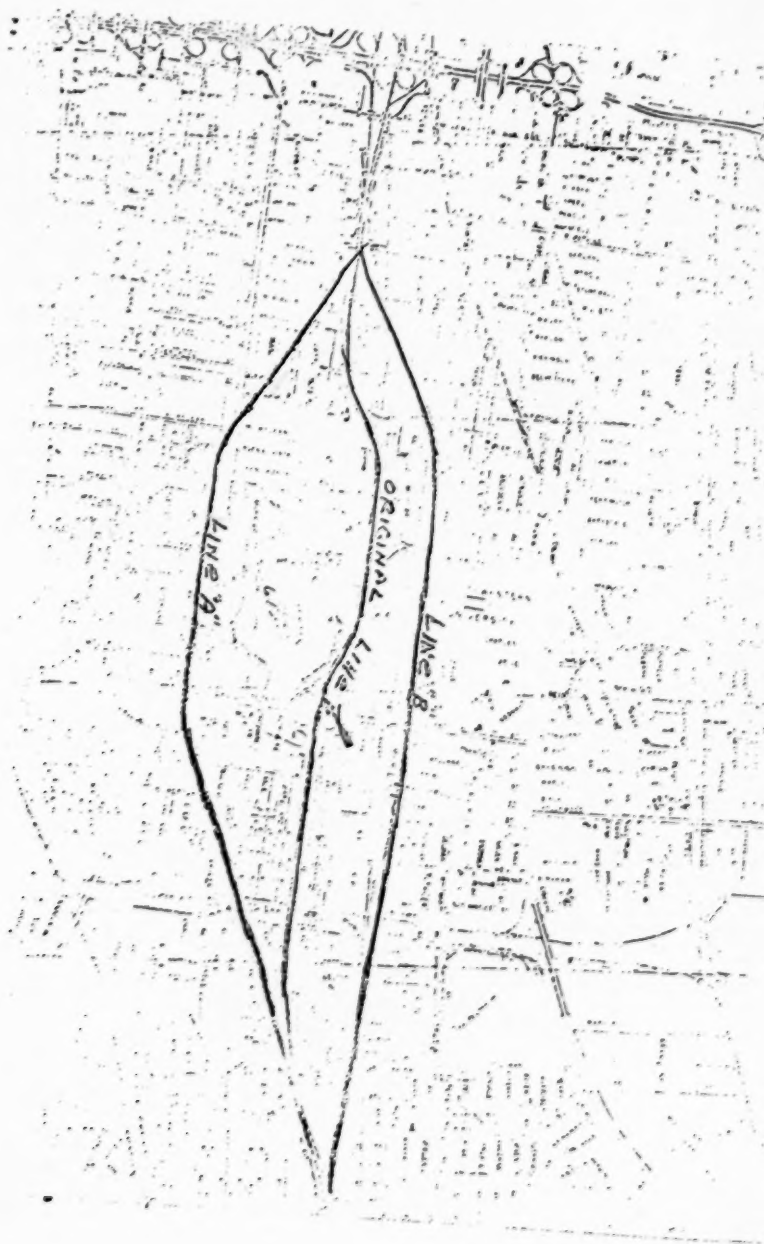
We want to appraise you of the fact that our firm has this capability and experience. Mr. Carl Gudat, head of our Planning Division, has extensive experience in landscape design and the many different types of flowers and shrubbery. He was landscape engineer for nine years with the U.S. Department of Interior, National Park Service, on the Natchez Trace Parkway doing about 600 miles of planning and development of this parkway through Virginia, Tennessee, Alabama and Mississippi. Mr. Gudat is known by Mr. McSween, Director of Conservation in Tennessee, and others in the Parks Department.

We request your consideration of our firm for the landscaping on the referenced project.

Very truly yours,
BUCHART-HORN

/s/ Paul Seiler, P.E.
Vice-President

PS/bjm



ESTIMATED CONSTRUCTION & R/W COST FROM GARLAND TO HOLMES STREET

<u>Line</u>	<u>Length</u>	<u>Est. Presented by SHD 8-23-65</u>	<u>SHD Updated Est. 9-2-65</u>
A	3.80	\$26,289,000	\$27,275,000
B	3.65	\$31,325,000	\$32,489,000
Approved	3.50	\$17,141,000	\$18,151,000

<u>Line</u>	<u>Length</u>	<u>Estimate Based on SHD Updated Est. of 9-2-65</u>
North Park Zoo	3.60	\$19,322,000*

- * This estimated cost was prepared by adjusting the State's updated estimate of 9-2-65 for the approved line. The adjustment was made to reflect additional right-of-way and construction costs shown in Buchar-Horn's Route location Study—Overton Park Area. This total estimated cost includes the estimated market value in place of the Zoo improvements (\$160,000). *It does not include cost of relocating the Zoo.*

The estimated cost figures presented by the State on August 23, 1965, have been previously furnished to Mr. Bridwell. The State adjusted these figures upward on September 2, 1965, to correct an error found in the approved location estimate and to reflect an increase in construction cost for all lines. As indicated, all lines increased the same approximately (\$1,000,000), therefore, relatively speaking, there was no change for comparative purposes.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF TENNESSEE

[Caption omitted in printing]

**MOTION TO DISMISS ON BEHALF OF DEFENDANT,
CHARLES W. SPEIGHT, COMMISSIONER,
DEPARTMENT OF HIGHWAYS**

Comes now your defendant, by and through his attorney, David N. Pack, Attorney General of the State of Tennessee, and J. Alan Hanover, special counsel, and respectfully joins the defendant, John A. Volpe, Secretary, Department of Transportation of the United States, in moving to dismiss the cause as expressed in the amended complaint heretofore filed by plaintiffs, for the reasons stated in said motion of the defendant, Volpe, filed on January 2, 1970, and incorporated herein as part of this motion, and the affidavit and attachments filed therewith. In addition thereto, this defendant incorporates as part of this motion and in opposition to plaintiffs' motion for preliminary injunctive relief, affidavits of the following persons:

Thomas E. Maxson, City Engineer, City of Memphis

Hal S. Lewis, Executive Director, Memphis Park Commission

Henry Loeb, Mayor, City of Memphis

Virgil A. Rawlings, Regional Right-of-Way Engineer, Tennessee Department of Highways

William S. Pollard, Jr., Partner, Harland Bartholomew & Associates

D. W. Moulton, Former Commissioner, Tennessee Department of Highways

Henry K. Buckner, Jr., Department Attorney, Tennessee Department of Highways

Luther W. Keeler, Development Engineer, Tennessee Department of Highways.

As a further ground for said motion to dismiss against the plaintiffs, Mrs. Sunshine K. Snyder and William W. Deupree, your defendant would point out to the Court that said plaintiffs allege that they have standing to sue as property owners near the proposed right-of-way whose property is, or is about to be, damaged. Such a cause of action, if facts exist to support same, is provided for by the "Inverse Condemnation Statute" of the state of Tennessee, known as § 23-1423 of the Tennessee Code Annotated, which gives said plaintiffs an adequate remedy under the law of the state of Tennessee.

DAVID N. PACK
Attorney General, State of
Tennessee

By Lurton C. Goodpasture,
Assistant Attorney General

HANOVER, HANOVER,
HANOVER, WALSH &
BARNES
Special Counsel
By J. Alan Hanover

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Caption omitted in printing]

AFFIDAVIT OF DON NEWMAN

Don Newman, being first duly sworn, deposes and says:

That he is a Commercial Photographer with offices in Memphis, Tennessee, and has been for many years;

That on February 18, 1970, at the request of United States Attorney Thomas F. Turley, Jr., he made from an

altitude of approximately 1500 feet the sixteen (16) photographs, numbered 1 through 16 with the date stamped on each, which are attached and made a part hereof; that those photographs numbered 1 through 14 show, sequentially, beginning at I-240 and proceeding westwardly, to the new bridge being built across the Mississippi River, the situation of the right-of-way and construction on I-40, in Memphis, Tennessee; that No. 15 shows the northern portion of Overton Park looking eastwardly and No. 16 shows the western end of the right-of-way with the piers of the new bridge across the Mississippi River visible in the background.

Further deponeth saith not.

/s/ Don Newman

Subscribed and sworn to before me this February 19, 1970.

W. LLOYD JOHNSON,
CLERK

By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Caption omitted in printing]

**MOTION FOR SUMMARY JUDGMENT ON BEHALF
OF DEFENDANT JOHN A. VOLPE, ETC.**

Defendant John A. Volpe, United States Secretary of Transportation, moves the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in his favor dismissing the "Complaint", as amended, of Citizens To Preserve Overton Park, Inc., et al., on the ground that there is no genuine issue as to any

material fact and that the defendant is entitled to such judgment as a matter of law.

This motion is based upon:

1. The pleadings on file.
2. The affidavits heretofore filed herein.

/s/ Thomas F. Turley, Jr.
 United States Attorney –
 Western District of Tennessee
 Attorney for Defendant
 John A. Volpe

SERVED by delivering a copy hereof to attorneys of record for plaintiffs, this February 20, 1970.

/s/ Thomas F. Turley, Jr.
 Attorney for Defendant Volpe

IN THE UNITED STATES DISTRICT COURT FOR THE
 WESTERN DISTRICT OF TENNESSEE
 WESTERN DIVISION

[Caption omitted in printing]

[37] First of all, with reference to the standing to sue of the plaintiffs insofar as the State of Tennessee is concerned. Number one, I do feel that the plaintiffs would have standing to sue against the State of Tennessee if they had raised some substantial constitutional issue. They have not done so. However, on the other side of the coin, the State of Tennessee is not asking this Court to permit it to withdraw, nor are we shrinking from the duty we feel we have to present the State's position in this case to the Court.

THE COURT: Well, actually, you intervened.

MR. HANOVER: Well, we intervened, Your Honor, at the suggestion of the District Judge in Washington, I believe

Judge Jones, and I am not at this time changing that position. Our purpose in being here, however, Your Honor, is [38] that we have an investment to protect. Specifically, an investment of some two million two hundred thousand dollars, which has already been paid to the City of Memphis and the Memphis Park Commission, and the great portion of which I think they have already spent or provided to spend. In addition to the balance of the route, which Mr. Turley has mentioned to us, which runs from White Station Interchange to the bridge. Our position, however, with reference to certain allegations, which we don't think have any place in this lawsuit, as to the allegations of the plaintiffs, Mrs. Snyder and Mr. Deupree—possibly I have misinterpreted their statements. I think they state as individuals that they have standing to sue because their property will be damaged by this taking.

THE COURT: I think Mrs. Snyder alleged that. She alleged she lived about fifteen hundred feet from the expressway on Kenilworth.

* * * * *

[115] THE COURT: Now, I indicated earlier, and I will be glad to hear you on this point, but I indicated earlier that I think the most that we could ever get into the merits of this case would be a determination as to whether or not the [116] Secretary had acted arbitrarily or capriciously in making this determination, and in no event would we ever be at liberty to review it as an original matter on the preponderance of the evidence. Do you agree the arbitrary and capricious test is the only one we could apply here?

MR. VARDAMAN: I think there are two tests that ought to be applied. The first ought to be whether he made an attempt to comply with the law—whether he made any finding there was compliance with the law.

THE COURT: That's a procedural point. We are talking about merits now.

MR. VARDAMAN: I think at that point the question would be whether in approving—I suppose it gets down to arbitrary or capricious.

THE COURT: That's what the cases say—that although we have some power of review of the administrative determination pursuant to the Administrative Procedure Act, our review is limited to the determination as to whether or not the Executive Department official acted arbitrarily and capriciously. Now, you didn't allege in your [117] complaint that he did act arbitrarily and capriciously. You just allege that there was indeed another route which was feasible and prudent.

MR. VARDAMAN: We say he has never complied with the statute. I say after he has come in and—after we have to prove that he hasn't attempted, has made no findings that the statute has been complied with and the evidence doesn't support that he has made any findings, he doesn't even come in and tell you that he has made any findings, we are entitled to an injunction until he goes through the mental process of deciding whether that statute has been complied with, and I think that's quite important here, because that statute requires a type of planning and a type of consideration designed to preserve parks such as Overton Park, and it hasn't been done in this case, and I can prove to you that it hasn't been done in this case.

THE COURT: Do you contend that it was an arbitrary and capricious decision on the merits?

MR. VARDAMAN: No. I don't contend that he never made any finding that there were no [118] feasible or prudent alternatives.

THE COURT: Well, let's assume, to get to the point then, let's assume that the law does not require that he actually write down and file somewhere a determination—yes, I find this to be the only feasible and prudent route. So we are past that point. Do you say it would be then an arbitrary and capricious decision as opposed to the other options?

MR. VARDAMAN: Yes, sir, I would.

THE COURT: You would?

MR. VARDAMAN: Yes, sir.

THE COURT: Well, you didn't allege that in your complaint.

MR. VARDAMAN: I didn't think that was necessary, at least at this point. I think it states a cause of action if we allege that he never made such a finding. The statute reads also that he shall not approve it if there are prudent and feasible alternatives. We have alleged, in the terms of the statute at least, that there are prudent and feasible alternatives.

THE COURT: Yes; and I gathered—I got [119] the impression from reading the complaint and also your briefs that you consider that you had a right to a trial de novo in this Court as to the issue as to whether or not there was a prudent and feasible alternative.

MR. VARDAMAN: I think that any proceeding of this sort is a review of his decision. I don't think it's settled under the statute. I agree with you that in most cases of this sort it is not a de novo decision. But the decision upon review is not, I submit, simply the decision to build a highway, but it's a decision in the terms of the statute of whether there are alternatives or the review of his decision with respect to design. If he never made those decisions, then we maintain that under that law we are entitled to an injunction until such time as he does, and I think that we have set forth in the terms that we have submitted—

THE COURT: (Interposing) On what do you base your statement that he did not make the decision, because there is nothing in writing that you know about that says, "I find this to [120] be true."?

MR. VARDAMAN: Because Mr. Bridwell, who had responsibility as administrator of making that decision in the first instance—Mr. Bridwell told Congress, "I left it up to the City. I didn't make the decision as to whether these were prudent or feasible."

THE COURT: That is not to say though that the Secretary didn't agree with the City's determination, is it?

MR. VARDAMAN: That's right. But I will offer to prove to this Court by Mr. Bridwell's deposition, which they have objected to my taking so far, that he never made such a finding. It's in his Congressional testimony. I think

it is implicit in his statements that he said, "Yes, there are alternatives, and I offered them, and I let the City decide."

* * * * *

[128] THE COURT: Again, we would be applying the arbitrary and capricious test, wouldn't we, to what he determined?

MR. VARDAMAN: If you find that he made a determination that these are impossible.

THE COURT: So the Court somewhere along the line, to give you any relief, would have to say it was arbitrary and capricious not to dig or bore a tunnel, or it was arbitrary and capricious [129] not to have a cut and fill tunnel or it was arbitrary and capricious not to have a partially covered tunnel, or not to have a siphon?

MR. VARDAMAN: I think if you had these public officials after their study saying it is impossible to do this, then we would have the issue of whether it was arbitrary and capricious. But I submit to you now there has been no such finding. They haven't attempted to evaluate these possibilities in the terms of this statute. They have planned it as if the statute weren't on the books. They have never considered whether these were possible. But I think once we get beyond that, I think I can show clearly that it was arbitrary and capricious to find that these devices are impossible, with due respect to Mr. Maxon, in this day and age when men are going to the moon and highways of this sort are being built, and if little Lick Creek can't be put under this, I am way off base.

THE COURT: Well, he says it can be done.

MR. VARDAMAN: That's right, and even for this one he doesn't say it is too expensive.

* * * * *

[132] THE COURT: Mr. Vardaman, do you see any constitutional issue in this case? If so, what is it?

MR. VARDAMAN: I think if the decisions are arbitrary and capricious, that's also generally to violate due process.

THE COURT: I believe somewhere in our original complaint, and I think also in the amended complaint you allege

deprivation of the Fifth and maybe the Fourteenth Amendments.

MR. VARDAMAN: We haven't developed that, and I am not pushing that.

THE COURT: Certainly as far as the State and City are concerned it was just a sale of land. The City owned the land, and through its duly constituted authorities sold it to the State in a negotiated deal.

MR. VARDAMAN: That's right.

THE COURT: So the only peg that you can possibly hang your hat on is by getting at the Secretary either through a procedural error or through the proposition that he was arbitrary and capricious so far as the substance of the matter [133] is concerned, right?

MR. VARDAMAN: That's correct.

THE COURT: Because absent these provisions in Title 23, you wouldn't have any basis to complain, would you, or these good folks who are complaining, because the State of Tennessee can buy land from the City—

MR. VARDAMAN: (Interposing) That's right. The State of Tennessee under the laws we are relying on they could build it right through there if they wanted to pay a hundred percent.

THE COURT: Suppose the State of Tennessee paid for the whole part that goes through the park, and then asked for the ninety percent from the "Feds" on that? Where would you be?

MR. VARDAMAN: You mean ninety percent for the other two sides?

THE COURT: Suppose they said all right, we won't ask for the ninety percent on the park, but the rest of it.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

[Caption omitted in printing]

MEMORANDUM DECISION AND JUDGMENT

This is an action to enjoin the Secretary of Transportation from releasing federal funds to the Highway Department of the State of Tennessee for construction of a segment of an expressway in the City of Memphis through Overton Park, which is a municipally owned and operated park used for a zoo and other recreational purposes. Plaintiffs Deupree and Snyder are residents, property owners and taxpayers in the City of Memphis; plaintiff Citizens To Preserve Overton Park, Inc., is a non-profit corporation organized and operated by Memphians for the purpose indicated by its name; plaintiffs Sierra Club and National Audubon Society, Inc. are non-profit corporations organized and operated to promote conservation. Defendant John A. Volpe is Secretary of Transportation and defendant Charles W. Speight is Commissioner of the Tennessee Department of Highways.

This action was filed in the District Court of the District of Columbia against defendant Volpe alone; thereafter, upon argument of his motion to dismiss and before decision thereon, that Court transferred the cause to this court in order that defendant Speight could be joined as such. This has since been done.

This court then set for hearing on February 20, 1970 both plaintiffs' motion for a temporary injunction and defendant Volpe's motion to dismiss. Defendant Volpe, prior to the hearing, also filed a motion for summary judgment, in which defendant Speight joined at the hearing, and this motion, rather than the motion to dismiss, was argued at the hearing. The motions for summary judgment and the motion for a temporary injunction are based on a large number of affidavits, including exhibits thereto, and not

only have we studied such affidavits and exhibits but also we have had the benefit of extensive argument.

Plaintiffs contend that the Secretary's final formal approval in November, 1969 of the involved project (which approval is necessary before the federal funds to be contributed, amounting to 90% of the total cost, can be released) is void because he did not follow procedures prescribed by statute and by regulation issued by the Bureau of Public Roads. They further contend that such approval is void because his determination, as required by statute, that this is the only feasible and prudent corridor for the expressway and his determination, as also required by statute, that all possible design safeguards have been taken to protect the park are arbitrary and capricious determinations.

Defendants contend that plaintiffs do not have standing to maintain this action, which contention we can forthwith overrule at least as to plaintiff Citizens To Preserve Overton Park. This organization through its officers and members has actively participated for some years in administrative proceedings for selection of the corridor and design of the expressway. *Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179 (6th Cir. 1967) and *South Hill Neighborhood Assoc., Inc. et al. v. Romney, et al.*, _____ F.2d _____ (6th Cir. decided November 24, 1969).

Defendants also contend that the record shows without dispute: (1) that the prescribed procedures were complied with; (2) that, even if there was a deviation from prescribed procedures, there was substantial compliance with them; (3) that any deviations from such procedures were harmless errors; (4) that if there was any deviation, such was a deviation only from the procedures prescribed by the Bureau of Public Roads in a Policy and Procedure Memorandum, which need not be followed as would a regulation; and (5) that the prescribed procedures upon which plaintiffs rely did not apply to the selection of the corridor for the expressway since such selection had been made prior to the promulgation of the procedures. Defendants, finally,

deny that defendant Volpe's approval of this project, either as to corridor or design, was arbitrary and capricious.

We deal first with plaintiffs' contention that the Secretary's approval is void because of procedural defects in the administrative proceedings.

With respect to their contention that statutory and regulatory procedures were not complied with, plaintiffs rely on 23 U.S.C. § 128, which provides in part:

"(a) Any State highway department which submits plans for a Federal-aid highway project . . . going through any city . . . shall certify to the Secretary that it has had public hearings . . . and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community

(b) When hearings have been held under subsection (a), the State highway department shall submit a copy of the transcript of said hearings to the Secretary, together with the certification."

In this connection, plaintiffs further rely on Policy and Procedure Memorandum 20-8 of the Bureau of Public Roads, which is Appendix A to Title 23 C.F.R., Chapter 1, Part 1. The relevant provisions are as follows:

"§ 8 Public hearing procedures.

* * *

(b) Conduct of public hearing.

* * *

(2) Provision shall be made for submission of written statements and other exhibits in place of, or in addition to, oral statements at a public hearing. The procedure for such submission shall be described in the notice of public hearing and at the public hearing"

* * *

(e) Transcript.

- (1) The State highway department shall provide for the making of a verbatim written transcript of the oral proceedings at each public hearing. It shall submit a copy of the transcript to the division engineer within a reasonable period . . . after the public hearing"

Section 10 of Policy and Procedure Memorandum 20-8 further provides that the corridor and design of an expressway will not be approved until the requirements of the Memorandum have been complied with.

It is undisputed that the notice of the May, 1969 hearing which was run in a local newspaper did not indicate that written statements could be submitted at the hearing. It is also undisputed that the equipment which was set up at the hearing for transcribing the proceedings malfunctioned so that some of the statements at the hearing were not included in the transcript that was sent to the Bureau of Public Roads. It is plaintiffs' contention that, with such defects in the notice and in the transcription, there was a déviation from the prescribed procedures and that therefore the approval of the project is void. It is, on the other hand, undisputed that all who appeared and whose oral statements were not transcribed were advised by certified mail that they could file a statement, that several of them did file such statements, and that a total of about forty statements were filed after the hearing. Further, plaintiffs have not even alleged, let alone shown by affidavit or otherwise, that there were persons who desired to make a statement but who did not do so because of lack of notice, or that there was any fact, argument, theory or position in support of another location or in support of another design which had not been, or at the hearing was not advanced to the state and federal authorities.

We recognize the requirement that an administrative agency follow its own procedural regulations. *Vitarelli v. Seaton*, 359 U.S. 535 (1959). We further assume that the

involved Policy and Procedure Memorandum should, for this purpose, be treated as a regulation. While doing so, however, we might say that we have considerable doubt that the Policy and Procedure Memorandum was intended to have the effect of a regulation. The preface to this Memorandum explicitly states that it was not being issued as a new part to the Bureau's regulations and was being made an Appendix to Part 1 to obtain for it the broadest distribution. This Memorandum is not included in the Code of Federal Regulations.

This Court has jurisdiction under 5 U.S.C. § 706 to determine whether the Secretary's approval is void because of procedural defects. This statute provides in part that agency action may be set aside if it is done "without observance of procedure required by law." However, a proviso to all of Section 706 is that the court shall view the whole record and take due account of the rule of prejudicial error. If a procedural error is harmless, the court is without authority to set aside an administrative determination.

At the outset it should be said that the May, 1969 hearing here attacked by plaintiffs, was only a design hearing rather than a corridor hearing, though the notice indicated it was to deal with both location and design. That this was only a design hearing was made completely clear at the hearing, and indeed the corridor had long since been approved and much of the right-of-way had been acquired prior to this design hearing. Accordingly, a corridor hearing was not required at that time (PPM 20-8 § 6(d)), and any defect in the procedure then could only affect the approval of the design.

Plaintiffs did not, at argument, seriously press the failure to obtain a full transcript of the May, 1969 hearing as a basis for the injunction sought here. Apparently they concluded that the offering of the opportunity to file written

statements later constituted a substantial compliance, with which we agree.¹

With respect to the failure of the newspaper notice to advise of the right to submit written statements, we believe that the undisputed facts show that there was substantial compliance with the regulation requiring such notice in that so many interested persons, including members of Citizens To Preserve Overton Park, were advised by mail of the right to file such statements and in that so many such statements were received after the hearing. After all, the whole purpose of the provision for filing such statements is to get all points of view before the Bureau and the Secretary and the undisputed facts show that this was accomplished.

We also conclude that, to the extent that the transcript and notice provisions were not literally complied with, on the undisputed facts this was harmless error. As we noted before, plaintiffs have not even alleged, let alone shown by affidavit or otherwise, that there were persons who desired to make a statement but who did not do so because of lack of notice, or that there was a fact, argument, theory or position in support of another design which had not been, or at the hearing was not advanced to the state and federal authorities. Further, we note that the corridor hearing in 1961 and the design hearing in 1969 were well attended and that interested persons who were fully prepared expressed objections and described alternatives to both the corridor and the design. Accordingly, the defendants are entitled to summary judgment on these issues.

Plaintiffs next rely on 23 U.S.C. § 138 which provides in part:

¹ It should be noted that the statute (23 U.S.C. § 128(b) only requires that "a copy of the transcript" be submitted and PPM 20-8 requires only that the "State highway department provide for the making of a verbatim written transcript . . ." and that a transcript be furnished. It is arguable that a verbatim transcript has been *provided for* even if not accomplished.

"§ 138. *Preservation of parklands.* It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands . . . * * * * [T]he Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park . . . of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area . . . resulting from such use."

The same provision is contained in 49 U.S.C. § 1653(f).

Plaintiffs contend that such statute requires that the Secretary publicly articulate an explicit finding that there is "no feasible and prudent alternative" and that "such program includes all possible planning to minimize harm to such park." It is undisputed that the Secretary did not make such a finding but there is no such requirement in the statute, and in the absence of such requirement we will not imply one.

More seriously, plaintiffs contend that the determinations by the Secretary, in approving the project, that there were no feasible and prudent alternatives and that all possible planning had been included to minimize harm to the park were arbitrary and capricious determinations. It is clear that we have jurisdiction to entertain this contention. 5 U.S.C. § 706; *Road Review League, Town of Bedford v. Boyd*, 270 F.Supp. 650 (S.D. N.Y. 1967).

The legislative history of the amendment to §§ 138 and 1653(f) makes it clear that it was not the intent of Congress to prohibit the building of an expressway through a park if there was *any* alternative; rather, by providing that such should not be done if there is any feasible and prudent alternative, it was the intent of Congress to avoid the park if, after considering all relevant factors, it is preferable to do so. In short, it appears to have been the intent

of Congress to point up the wisdom of conserving park lands and the lack of wisdom in routing an expressway through a park because the land is cheaper and the construction is easier. As stated in Report of House Managers (U.S. Code Cong. & Adm. News, 90th Cong., 2d Session, 1968, p. 3538):

"This amendment of both relevant sections of law is intended to make it unmistakably clear that *neither* section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that, clearly enunciated local preferences should be overruled on the basis of this authority [Appendix I]."

With respect to the reference to the "clearly enunciated local preferences" in the foregoing statement, it should here be pointed out that the Mayor and Council of the City of Memphis have heretofore approved this corridor and design and have approved the sale of this strip through Overton Park to the State of Tennessee for \$2,209,000. The land has been conveyed and paid for. Of this amount, \$1,000,000 has already been spent for a 160 acre golf course; \$209,000 will be spent on the zoo; and the balance of \$1,000,000 must by law be expended to acquire other park land. Also, the Memphis Park Commission, which had disapproved of the corridor, acquiesced after it was approved by the Mayor and Council and the Commission has approved the design as being the best one for the park. Since § 138 by its terms is invoked only if the park "is of local significance as determined by Federal, State or local officials having jurisdiction thereof," in view of the approval by the Mayor and Council, it may well be that § 138 simply has no application here.

The affidavits show without dispute, in addition to the foregoing, that the corridor and design have been under

official and public discussion for many years; that the corridor chosen as the only feasible and prudent one was determined to be such by the federal, state and city authorities and by Harland Bartholomew and Associates, a private consulting firm which has handled the city planning of Memphis since 1924; that the design has been approved by federal, state and local authorities as being the most practicable design to protect the park and zoo in all respects and that the Park Commission is of the opinion that, with such design, the park and zoo will not be functionally impaired.² All of the property along the proposed corridor has been condemned, most of the buildings within the expressway path have been destroyed, and the persons and businesses affected have been relocated. It is completely clear that, with respect to corridor and design, those who made the decisions did not confine their considerations to cost and engineering problems but rather considered all factors including the intangible values in a park and zoo.

We recognize that normally a motion for summary judgment should not be granted if it is made properly to appear that a determinative fact is in dispute. Here, however, we would not, at a plenary hearing, have for determination whether there is a feasible and prudent alternative to the corridor or whether there is a reasonable alternative to the design that would protect the park more. These are determinations to be made by the Secretary of Transportation, and he has decided that no such alternatives exist. We could be concerned with the question and only the question of whether or not the determinations as made were arbitrary and capricious. Our study of the affidavits and exhibits on file convince us that, from the undisputed facts, we could

² Although the statute requires that all "possible" planning be done to minimize harm to the park, plaintiffs conceded at argument that a rule of reason is applicable here. However, they urged that it would not be unreasonable to expend an extra 107 million dollars for a bored tunnel if such would be at all advantageous to the park.

never find in this case that, as contended by plaintiffs, such determinations are so wrong as to be arbitrary and capricious. This being so, we conclude that defendants are entitled to summary judgment on this issue as well as the other issues in the case.

It is therefore ORDERED that the motion of plaintiffs for a temporary injunction be denied and that the motion of defendants for summary judgment be granted and the action is dismissed.

ENTER this 26th day of February, 1970.

/s/ CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

[Caption omitted in printing]

NOTICE OF APPEAL

Notice is hereby given that Citizens to Preserve Overton Park, Inc., William W. Duepree, Sr., and Sunshine K. Snyder, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the Memorandum Decision and Judgment entered in this action on 26th day of February, 1970, and from the orders set forth therein denying the plaintiffs' motion for a preliminary injunction.

tion and granting the defendants' motion for summary judgment and dismissing the action.

/s/ John W. Vardaman, Jr.

Wilmer, Cutler & Pickering
900 17th Street, N.W.
Washington, D.C. 20006

/s/ Charles Forrest Newman

Burch, Porter & Johnson
Court Square Building
128 North Court Avenue
Memphis, Tennessee 38103

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

[Caption omitted in printing]

NOTICE OF APPEAL

Notice is hereby given that Sierra Club and National Audubon Society, Inc., plaintiffs above named, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the Memorandum Decision and Judgment entered in this action on the 26th day of February, 1970, and from the orders set forth therein denying the plaintiffs'

motion for a preliminary injunction and granting the defendants' motion for summary judgment and dismissing the action.

/s/ John W. Vardaman, Jr.
Wilmer, Cutler & Pickering
900 17th Street, N.W.
Washington, D.C. 20006

/s/ Charles F. Newman
Burch, Porter & Johnson
Court Square Building
128 North Court Avenue
Memphis, Tennessee 38103

Nos. 20344 and 20345

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CITIZENS TO PRESERVE OVERTON PARK,
INC., WILLIAM W. DEUPREE, SR.,
SUNSHINE K. SNYDER, SIERRA CLUB,
AND NATIONAL AUDUBON SOCIETY,
INC.,

Plaintiffs-Appellants,

v.

JOHN A. VOLPE, SECRETARY DEPART-
MENT OF TRANSPORTATION, AND
CHARLES W. SPEIGHT, COMMISSION-
ER TENNESSEE DEPARTMENT OF
HIGHWAYS,

Defendants-Appellees.

ON APPEAL from the
United States District
Court for the West-
ern District of Tenn-
essee, Western Divi-
sion.

Decided and Filed September 29, 1970.

Before: WEICK, CELEBREZZE and PECK, Circuit Judges.

WEICK, Circuit Judge. The present action was brought by plaintiffs, Citizens to Preserve Overton Park (a corporation organized for the purpose its name implies), William W. Deupree, Sr. (a taxpayer), Sunshine K. Snyder (a taxpayer and owner of property affected by the proposed highway route), the Sierra Club (a nonprofit corporation organized for conservation of natural resources), and the Audubon Society, Inc. (also a conservation organization). The defendants are

2 *Citizens etc., et al. v. Volpe, Secy., et al.* Nos. 20344-45

John A. Volpe, Secretary of Transportation, and Charles W. Speight, Commissioner of the Tennessee Department of Highways.¹

The plaintiffs, claiming that Secretary Volpe had not complied with statutory mandates before releasing federal funds for an interstate highway and that administrative procedures had not been substantially followed, sought injunctive relief against Secretary Volpe prohibiting him from releasing federal funds (which represent 90% of the total cost) for the construction of a section of Interstate 40 through Overton Park, a public park in Memphis, Tennessee, and also enjoining Commissioner Speight from proceeding further on the proposed segment of the highway through Overton Park.²

The District Court granted defendants' motion for summary judgment. 309 F.Supp. 1189 (W.D. Tenn. 1970). The plaintiffs appealed. We affirm.

Overton Park is a 342 acre, municipally owned park in midtown Memphis used for a zoo, 9-hole golf course and other recreational purposes. The proposed section of the interstate highway extends in an east and west direction through the Park over the presently existing paved, non-access highway used by diesel buses which is approximately 4,800 feet in length. The existing highway is 40 to 50 feet wide. The proposed interstate will consist of six lanes — three running in

¹ The action was originally filed in the United States District Court for the District of Columbia solely against Secretary Volpe. Before the motion for preliminary injunction and the motion to dismiss were decided, the action was transferred to the United States District Court for the Western District of Tennessee where Commissioner Speight was made a defendant.

² While there may be some question whether the District Court had jurisdiction to enjoin Commissioner Speight, in view of our disposition of the case, it is unnecessary to decide that issue. There are cases indicating that there is jurisdiction. *Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179 (6th Cir. 1967), cert. denied 390 U.S. 921 (1968); *Road Review League, Town of Bedford v. Boyd*, 270 F.Supp. 650, 663-64 (S.D. N.Y. 1967). It may well be doubted, however, whether the District Court could properly enjoin Commissioner Speight if the state desired to use its own funds to construct the highway on its own property.

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each direction, separated by a median strip approximately 40 feet wide. The interstate right-of-way will vary from approximately 250 feet in width to approximately 450 feet in width, and will require the use of approximately 26 acres of the Park. The proposed design requires that a large portion of the highway be depressed sufficiently to remove traffic from the sight of users of the Park, however, five or six feet of fill will be required where a creek runs across the right-of-way. A 1200 foot access ramp will be located within the eastern end of the park.

Because this case is on appeal from a summary judgment, the only question is whether there remains a genuine issue over any material fact in dispute. Appellants argue that there are several material facts which are genuinely disputed. They contend that it is disputed whether the Secretary made the determinations required by law before authorizing the release of federal funds.³ Appellants also argue that administrative procedures were not followed because of failure to include in the notice of a public hearing any provision for the submission of written statements.

When considering a motion for summary judgment a court is required to "construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated." *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962). If, after having done that, the court is able to say there is no genuine issue as to any material fact, summary judgment is appropriate.

Although a court must be hesitant to grant summary judgment, cases challenging administrative action are ripe for summary judgment. See, e.g., *Todaro v. Pederson*, 205 F.Supp. 612, 613 (N.D. Ohio 1961), *affm'd* 305 F.2d 377 (6th

³ Release of the funds was enjoined by order of this Court pending disposition of the appeal.

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Cir.), *cert. denied* 371 U.S. 891 (1962). Unlike civil actions originating in the District Court, litigants challenging administrative action are not entitled to a *de novo* hearing. See, e.g., *Dredge Corp. v. Penny*, 338 F.2d 456, 462 (9th Cir. 1964). Rather, in such cases the court must determine whether the administrator's decision was arbitrary and capricious. 5 U.S.C. § 706(2)(A).⁴

In addition to the narrow scope of review of administrative action, plaintiffs are faced with the additional burden of overcoming a presumption of regularity afforded the acts of an administrator. See *Goldberg v. Truck Drivers Local Union No. 299*, 293 F.2d 807, 812 (6th Cir.), *cert. denied* 368 U.S. 938 (1961); *Nolan v. Rhodes*, 251 F.Supp. 584, 587 (S.D. Ohio 1965), *affm'd* 383 U.S. 104 (1966). The presumption of regularity is a particularly strong one. See, e.g., *Braniff Airways, Inc. v. C.A.B.*, 379 F.2d 453, 460 (D.C. Cir. 1967). This, of course, does not relieve the party moving for summary judgment from the burden of showing that there remains no dispute concerning any material facts. It does, however, affect the type of evidence required to carry his burden. It also makes clear that a party opposing summary judgment must do more than merely assert that the administrator's actions were unlawful. He must be able to show by affidavit, or other evidence, that there is at least a possibility that he will be able to overcome the presumption of regularity. 379 F.2d at 462.

In this case, the threshold question is whether the Secretary made the proper determinations at all, let alone whether those determinations were arbitrary and capricious.

Congress has declared it a national policy to preserve parklands and has forbidden the Secretary to approve a project which affects a park unless he first determines "(1) there is no feasible and prudent alternative to the use of such land,

⁴ The Administrative Procedure Act is made applicable to actions of the Department of Transportation by 49 U.S.C. § 1655(h).

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and (2) such program includes all possible planning to minimize harm to such park . . . resulting from such use." 49 U.S.C. § 1653(f).⁵

Appellants urge that there is no evidence that the Secretary ever made the necessary two findings before authorizing the release of funds.

There is no requirement in the statute that the Secretary articulate his findings. Nor are we free to impose such a requirement on him. See *Braniff Airways, Inc. v. C.A.B.*, *supra* at 460.

We are of the opinion that the moving party introduced competent evidence tending to prove that the necessary determinations were made by the Secretary.

An affidavit was submitted on behalf of the Secretary by Edgar H. Swick. Swick was Deputy Director of Public Roads⁶ and therefore could give competent evidence from his personal knowledge concerning the necessary determinations.⁷

⁵ The text of 49 U.S.C. § 1653(f) in full is as follows:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

This same provision is contained in 23 U.S.C. § 138.

⁶ The Bureau of Public Roads, originally a part of the Department of Commerce, was transferred to the Department of Transportation in 1967. 49 U.S.C. § 1655.

⁷ The Secretary is authorized to act through delegates. 49 U.S.C. § 1657(e)(1).

Mr. Swick attested that the original decision with respect to the route was made in 1956 by the Bureau of Public Roads. Although the relevant statutes dealing with parklands were not in force in 1956 and, therefore, it is unlikely that the Bureau had specifically in mind the necessary requirements, subsequent determinations were made reaffirming the original decision to route along the bus highway. Mr. Swick attested:

"The location of I-40 along the bus route through Overton park was approved by the Bureau of Public Roads in 1956. All alternate alignments were rejected because of large displacements of persons, hospitals, schools, churches, and commercial establishments. For instance, the route immediately north of the park would have involved the taking of three schools, including Southwestern University and the largest high school in Memphis, plus churches attended by 4,000 people, industries, and the residences of more than 1,500 people. The route south of the park would have involved taking two schools, three churches attended by 7,500 people, 46 commercial establishments, residential units being occupied by over 3,000 persons and a hospital and home for the aged. Incidentally, the construction and right-of-way costs of the least expensive of these alternate routes would exceed the costs of the chosen route by many millions of dollars.

"The 1956 determination that the only feasible and prudent location for the highway was on the present bus route through the park was reaffirmed by Federal Highway Administrator Whitton in 1966, [Exhibit A], Federal Highway Administrator Bridwell and Secretary of Transportation Boyd in 1968, [Exhibit B], and Federal Highway Administrator Turner and Secretary of Transportation Volpe in 1969, [Exhibit C]"

The exhibits referred to consist of press releases and correspondence between various officials of the state and federal governments. Appellants challenge the admissibility of

these documents. These documents were admissible to show what was considered by the Secretary when he made his determinations. Mr. Swick's assertions that the necessary determinations were made and the reasons therefore are unchallenged by any evidence, and there is nothing to indicate that his statements could be disputed at a trial. With respect to the routing of the road, it is clear that the Secretary made the determinations required by law.

In addition to the valid reasons for choosing the route listed in the affidavit, Mr. Swick went on to point out that as of 1967, prior to the time Secretary Volpe took office, all of the right-of-way leading up to either side of the Park had been acquired and substantial work had been done. The right-of-way through the Park had also been acquired by the state from the City of Memphis, though no work on it has yet been done.⁸ As of the time of this case, the interstate route had been excavated up to either end of the park with the resulting disruption of homes and businesses that necessarily result whenever a major highway is routed through a city. See *Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179, 185 (6th Cir. 1967), *cert. denied* 390 U.S. 921 (1968). If it were now determined that a new route be chosen (the only suggested alternatives⁹ include businesses and residences) not only would there be additional disruption, but that already caused would have been futile and wasteful. Even assuming that the Secretary was not aware of this condition, the

⁸ The state paid the City \$2,000,000 and acquired the legal title to the strip of land consisting of 26 acres by deed. The state paid the City an additional \$209,000 to construct additional parking areas, to move a wooden pavilion, and to relocate various utilities. The City was required by ordinance to replace any parklands taken with additional parks. The City has spent \$1,000,000 of these funds for a 160 acre golf course; \$209,000 will be spent on the zoo, and the balance of \$1,000,000 is required to be expended for other parklands.

⁹ The fact that alternative routes can and have been suggested goes to the issue of the reasonableness of the Secretary's decision. We have indicated in the text that alternatives would now be unreasonable on the facts of this case. A discussion of reasonableness as a disputed fact is included *infra*.

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court could not ignore the social and economic impact of changing the route at this late date. See *Road Review League, Town of Bedford v. Boyd*, 270 F.Supp. 650, 664 (S.D. N.Y. (1967)).¹⁰

Appellants argue that they have introduced evidence which tends to dispute the fact that the Secretary ever made a determination that there were no feasible and prudent alternatives. Specifically they submitted as an exhibit, the testimony of Lowell K. Bridwell, the former Federal Highway Administrator who approved the route in 1968, to a Congressional committee with respect to his approval.

"We went to the city council of Memphis and we said, 'Yes, there are alternatives. We won't even give you any information on what the alternatives cost in dollars because we don't want that to be a factor in your recommendation of which line to choose. Rather, we would like you to focus upon the conflicting set of community values that are inherent in this kind of a situation.'"

Appellants contend that the Secretary merely delegated his duty to the Memphis City Council by allowing it to choose the route.

In our opinion, the testimony of Mr. Bridwell is further evidence that the Secretary complied with the statute. The legislative history of the statute makes it clear that local preferences are to be considered:

¹⁰ The legislative history of the statute is revealing:

The committee would further emphasize that while the areas sought to be protected by section (4) (f) of the Department of Transportation Act and section 138 of title 23 are important, there are other high priority items which must also be weighed in the balance. The committee is extremely concerned that the highway program be carried out in such a manner as to reduce in all instances the harsh impact on people which results from the dislocation and displacement by reason of highway construction. Therefore, the use of park lands properly protected and with damage minimized by the most sophisticated construction techniques is to be preferred to the movement of large numbers of people. 1968 U. S. Code Cong. & Adm. News at 3500.

This amendment of both relevant sections of law is intended to make it unmistakably clear that *neither* section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that clearly enunciated local preferences should be overruled on the basis of this authority. 1968 U.S. Code Cong. & Adm. News at 3538.

Appellants contend that the Secretary did not determine that the approved plan included "all possible planning to minimize harm" to the Park. Appellants argue that there are at least three designs which are possible and which would minimize harm to the park: a bored tunnel, a cut and cover tunnel or a highway depressed below the ground level.

The affidavit of Mr. Swick mentions all of these possibilities and the reasons for rejecting them. It is unnecessary to go into elaborate detail. However, it is basically undisputed that instead of the estimated \$3.5 million cost of the present design, a cut and cover tunnel would cost approximately \$41.5 million and a bored tunnel over \$100 million. While not controlling on whether these designs are possible, cost is certainly a legitimate consideration. Mr. Swick's affidavit also attests that not only would there be a huge price differential, but the benefits to be gained would be minimal. The Park's vegetation would not be preserved; there would be air pollution problems at the tunnel vents; there would be additional traffic hazards; and there would be serious drainage problems caused by depressing the road beneath the level of a creek that runs across the proposed right-of-way.

The affidavit makes it clear that the Secretary was fully aware of the alternative designs and chose the one now in effect. Other than appellants' bald assertion that the Secretary did not make such a finding, the evidence points to the

fact that the Secretary did determine that the proposed design included "all possible planning to minimize harm" to the Park. By introducing affidavits tending to show alternative designs, appellants really raise the issue of whether there is a genuine dispute that the Secretary's determination was arbitrary and capricious. Whether the Secretary's determination that the proposed plan included "all possible planning to minimize harm" to the Park depends on an interpretation of the word "possible." It would be unrealistic to say the Secretary must approve any possible plan no matter what the cost and engineering problems compared to whatever minimal gains. "Possible" must be interpreted within the bounds of wisdom and reasonableness.

The District Court was correct that it cannot hear de novo the determination of the Secretary. In another case involving a section of this same interstate highway, this Court has cited *Berman v. Parker*, 348 U.S. 26, 35 (1954), where the Supreme Court held: "It is not for the courts to oversee the boundary line nor sit in review on the size of a particular project area." *Nashville 1-40 Steering Committee v. Ellington*, *supra* at 185. This holding applies with equal force to the design for the highway. The pleadings, affidavits and exhibits in this case make it clear that there is no factual dispute about what design was chosen and what the alternatives were. The only issue is the wisdom of the choice. Under these facts, the District Court, in our opinion, was justified in holding that the necessary determinations required by the statutes were made in good faith by the Secretary and that such determinations were not arbitrary or capricious. A trial on the issues would be an exercise in futility.¹¹

¹¹ The case of *Medical Committee for Human Rights v. Securities and Exchange Commission*, 39 U.S.L. Week 2038, 2039 (D.C. Cir. 1970), relied on in the dissent, involved the question whether a decision of the Commission relating to proxy material was actually subject to judicial review. It does not support the thesis of the dissent that the Secretary of the Department of Transportation, whenever he approves the location, design and construction of a highway must adopt findings of fact and conclusions of law. These matters, in our judgment, involve the exercise of discretion and are review-

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Appellants contend that there was not substantial compliance with the requirements for a public hearing. 23 U.S.C. § 128 requires a state submitting plans for a federal-aid highway to conduct a public hearing and to forward a transcript of the hearing to the Secretary along with a certification by the state highway department that it "has considered the economic and social effects of such a location [of a road through a city], its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community." Relative to the notice for such hearing, the Department of Transportation issued Policy and Procedure Memorandum 20-8, 23 C.F.R., Chap. I, Part 1, § 8, which provides in relevant part:

"(2) Provision shall be made for submission of written statements and other exhibits in place of, or in addition to, oral statements at a public hearing. The procedure for such submission shall be described in the notice of public hearing and at the public hearing"

It is undisputed fact that the Tennessee Highway Department gave notice of a public hearing to be held on May 19, 1969, but that the notice failed to contain any provision for the submission of written statements. It is also undisputed that written statements were submitted.¹² Appellants are unable to cite a single instance in which an interested party was deprived of an opportunity to be heard, nor are they able to indicate any additional information that was not

able only when they are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2) (A).

Nor do we believe that the District Court abused its discretion by not permitting discovery for the purpose of probing the mental processes of the Secretary in arriving at his decision. *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Braniff Airways, Inc. v. C.A.B.*, 379 F.2d 453, 462 (D.C. Cir. 1967).

¹² Written statements were specifically requested and received from witnesses whose testimony was not recorded because of a failure of the recording device. The 1969 hearing was on the design. About 40 statements were filed after the hearing. A corridor hearing was held in 1961. Both hearings were well attended. Both corridor and design were approved by federal, state and city authorities.

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submitted at the hearing as a result of the deficiency in the notice. In dealing with errors committed by administrative agencies we are required to take due account of the rule of prejudicial error. 5 U.S.C. § 706; see, e.g., *Braniff Airways, Inc. v. C.A.B.*, *supra* at 465-66. We are in accord with the District Court that the failure to include a method by which to submit written statements was, on the facts of this case, harmless error.

We do not read *D.C. Federation of Civic Associations, Inc. v. Volpe*, — F.2d — (D.C.Cir. 1970) to dictate a different result. In that case no hearing at all had been provided for, while in the present case there was a very adequate hearing.

Other issues have been raised which we considered but do not deem them as meriting discussion.

The injunction pending appeal is dissolved and the judgment of the District Court is affirmed.

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CELEBREZZE, Circuit Judge, *dissenting*. For two principal reasons, I respectfully dissent from the majority's affirmance of the district court's grant of summary judgment in this case.¹

¹ In addition to my two principal grounds for dissent, I have grave reservations about the majority's apparent holding that Section 10 of the Administrative Procedure Act, 5 U.S.C. § 706 (1966), and the due process clause of the Fifth Amendment require no higher scope of review of the Secretary of Transportation's actions, under 23 U.S.C. § 138 (Supp. IV 1965-1968), than "arbitrary and capricious."

Congress has declared it to be

"the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." 23 U.S.C. § 138.

Title 23 requires that the communities affected by massive federally-funded highway projects be consulted at each stage of their planning and development. 23 U.S.C. § 128 (Supp. IV 1965-1968). In accordance with Congress's declaration of "national policy," the Secretary of Transportation is charged with the responsibility of reviewing the records of the public hearings held in the affected communities, and is required to consult ("shall consult and cooperate with") the Secretaries of the Interior, Housing and Urban Development, and Agriculture.

Under section 138, the Secretary is absolutely forbidden ("shall not approve") from approving "any" appropriation for a highway through a public parkland

"unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . resulting from such use." 23 U.S.C. § 138 [Emphasis added].

It is important to note that the statute does not provide, as the majority implies that it does, "unless he first determines '(1) there is . . .'" The statute provides "unless (1) there is . . ." The words "he first determines" are those of the majority, not of Congress.

The provisions of Title 23 provide the only avenue for direct citizen participation in decisions concerning the planning and construction of massive federal highway projects, decisions that may well have greater direct impact on the lives of citizens and the physical environment in which they live than any other governmental action. See *D.C. Federation of Civic Associations, Inc. v. Volpe*, No. 23,870 (D.C. Cir., Apr. 6, 1970).

"The Supreme Court has made it clear in a series of cases that the right of effective participation in the political process 'is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.' These rights, according to the Court, are 'individual and personal,' they touch a 'sensitive and important area of human rights,' and they involve the 'basic civil and political rights' of citizens. [Citations omitted.]" *Id.* Slip opinion at 11.

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First, this case is inappropriate for summary judgment. "[S]ummary judgment should be granted only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is and no genuine issue of fact remains for trial." *Rogers v. Peabody Coal Company*, 342 F.2d 749, 751 (6th Cir. 1965). "In ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated." *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962).

By perfunctorily approving a highway appropriation under section 138, the Secretary of Transportation can nullify the important procedural guarantees of Title 23, as well as render illusory the "national policy" declared by Congress. When such terrific power over environmental affairs is placed in the hands of an administrative official with minor expertise in the natural sciences, the courts must scrupulously oversee his judgment, in order to guarantee to the people of the affected communities that their words, and the words of their experts, have not merely been recorded and transcribed, but rather weighed and scrutinized in the manner of courtroom evidence.

Yet, the majority holds that the Secretary's determinations will be upheld unless "arbitrary and capricious." This holding is based, I believe, not only upon their incorrect reading of section 138 (i.e., "he first determines . . ."), but also upon a misreading of the Administrative Procedure Act. On my reading of section 10 of that Act, where an agency hearing is required by statute, an administrative decision made upon the basis of that hearing must be supported by substantial evidence. 5 U.S.C. § 706(2)(E) (1966). To digress somewhat, the Act further requires that, regardless of the scope of review, i.e., substantial evidence or arbitrary and capricious, the "court shall review the whole record or those parts of it cited by a party." The district court in this case, however, effectively precluded a review of the record on which the Secretary based his determination, assuming the Secretary did make one, by denying the Appellants access to it in discovery. How either the district court or a majority of this panel could determine whether the Secretary's determinations were arbitrary and capricious on the record as a whole, without having the record on which the Secretary based his decision, is enigmatic to me.

In any event, notwithstanding the Administrative Procedure Act, I do not believe that due process contemplates a lesser evidentiary showing when a neighborhood park is threatened by the construction of a freeway, and the health, safety, and peace of mind of a community is imperiled, than the National Labor Relations Board needs to enforce a cease and desist order against one employer who might inadvertently discriminate against one employee, or than a municipal traffic court requires to fine one parking violator.

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Even though the facts may be undisputed, if there is a dispute over the inferences to be drawn from the facts, summary judgment is not proper. *Knapp v. Kinsey*, 249 F.2d 797 (6th Cir. 1957). See generally, 6 Moore, *Federal Practice* 2281-86 (2d ed. 1966).

The two most critical issues of fact in this case are in vigorous dispute: (a) whether the Secretary made the determinations required of him by statute (i.e., "no feasible and prudent alternative," and "all possible planning to minimize harm"); (b) whether, assuming the Secretary made those determinations, they were supported by sufficient evidence (either "substantial evidence" or, as the majority prefers, "arbitrary and capricious") on the record as a whole.² Indeed, the only facts over which there is no dispute are that the Secretary approved an appropriation for a highway through Overton Park, which is a "park" within the meaning of section 138.

(a) As the majority points out, Mr. Swick attested that in 1956 (which was, incidentally, 12 years prior to the creation of the Department of Transportation and the enactment of section 138 as it currently stands) some federal official determined that Overton Park was "the only feasible and prudent location for the highway," and that this determination was subsequently reaffirmed by Secretaries of Transportation. However, Swick's undocumented affidavit is disputed by evidence from at least two other individuals. Mr. Arlo I. Smith, an officer of the Citizens to Preserve Overton Park, swears that the Secretary made no such finding. Swick's assertion is further disputed by the transcript of testimony of Mr. Lowell K. Bridwell, a former Federal Highway Administrator, before

² As was noted above, n. 1 at p. 14, the district court denied the Appellants access to the record on which Secretary Volpe was supposed to have made his decision, by denying their motions to depose government officials. This makes a determination of whether the Secretary's judgment was supported by sufficient evidence "on the whole record" impossible, and on a motion for summary judgment, is reversible error. See generally, 6 Moore, *Federal Practice* 2397 (2d ed. 1966).

a congressional committee. Before that committee, Mr. Bridwell swore, among other things, that the decision to build the highway through the park was left "completely in the hands of the city council" of Memphis. As the principles and authorities cited above indicate, on a motion for summary judgment the district court and this court are required to "construe the evidence in its most favorable light in favor of the party opposing the motion." By no means, on a motion for summary judgment, may a court credit the affidavits of the movant over those of the party opposing the motion, unless the latter are patently false, forged, or perjured. In crediting the affidavit of Mr. Swick over the opposing documents and affidavits that were tendered on this motion for summary judgment, the district court, in my opinion, committed reversible error.

(b) Every explanation given by Mr. Swick of the reasons why other routes were neither feasible nor prudent, and why no other plan would include all possible planning to minimize harm to the park, is rebutted by affidavits and other public statements of private citizens, independent experts, and other federal and local agencies. Without attempting to review all the evidence the district court had before it on this issue, I will cite just one example. Letters from officials of the Department of the Interior, with whom the Secretary of Transportation was *statute bound* to consult, indicate that "[o]nce the park has been separated by the expressway its values have been seriously impaired," and, regarding the tunneling issue, "regardless of what type of surface design is followed there won't be much left in the way of a wooded park left in Overton Park after an interstate Highway is routed through it." There is a littany of other competent evidence that the route chosen was neither the only feasible nor prudent alternative, but that the method selected did not include all possible planning to minimize harm. This other evidence, which the majority did not even mention, should have been construed most strongly in favor of the Appellants. Again applying

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the "presumption of regularity" liberally and with unorthodox zeal, the district court and the majority of this panel credited only the affidavit presented by the movant. In doing so, I believe each committed error. A genuine issue of material fact exists as to whether, assuming the Secretary made any determination at all, his determinations that the route selected was the *only* "feasible and prudent alternative to the use of" parkland, and that the method selected included "all possible planning to minimize harm" were supported by substantial evidence on the record that we have before us (or, as the majority prefers, arbitrary and capricious).

I would remand this case to the district court for an evidentiary hearing on issues (a) and (b).

I now turn to my second ground for dissent. The Secretary acted on a hotly disputed record and could reasonably have foreseen that his actions would eventually have to be reviewed. Yet, he rendered no findings of fact and conclusions under section 138 or otherwise. Surely, if a statute requires an administrator to make absolute determinations³ that are subject to review, those findings must appear in the record, and they must be sufficiently clear and complete so that the reviewing court can determine whether they are supported by sufficient evidence. *Cf. Medical Committee for Human Rights v. Securities Exchange Commission*, 39 U.S.L.W. 2038, 2039 (D.C. Cir., July 8, 1970). How a reviewing court can determine whether the Secretary's findings were supported by sufficient evidence, when the Secretary has published no findings, is a source of great puzzlement for me.

In conclusion, public parklands are the only remaining weekend sanctuaries for vast numbers of city dwellers from the polluted urban sprawl. A threat to a neighborhood parkland is a threat to the health, happiness, and peace of mind of

³ Section 138 is not a statute granting broad discretionary authority. Under the statute, the Secretary "shall not" make "any" appropriation "unless (1) there is" This statute requires the Secretary's findings to be, within a fine range of reasonable human tolerances, absolute. It leaves no room for "discretion."

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all the neighborhood people. Congress recognized this fact. The Highway Act therefore requires that the public, and their experts, be consulted, and that their testimony be weighed in the manner of courtroom evidence by the federal officials responsible for funding highway projects. The Secretary has not fulfilled his duty under Title 23 simply by seeing that the requisite hearings are conducted and the necessary advice solicited. He must weigh all the evidence carefully and deliberately, and his decision must be reviewed with great scrutiny. It cannot be if it is not accompanied by findings of facts and conclusions. At the very least, procedural due process means that the people of this country be listened to, and heard, on matters affecting their daily lives as directly as the environment in which they live. Obviously, the federal courts do not have the technical expertise of roadbuilders, and they should never interfere in the technical processes of building roads. It is our solemn responsibility, however, to insure that those with technical expertise exercise it in accordance with the laws of the United States and the public welfare.

I would remand this cause to the district court with the suggestion that it treat the action as a mandamus proceeding, pursuant to the mandamus jurisdiction given it by 28 U.S.C. § 1361 (1964). I would further instruct the district court to direct the Secretary of Transportation to render findings of fact from which a reviewing court could determine whether he properly discharged his statutory responsibility. I would continue the stay this Court initially put into effect until the above course of action is completed and the Appellants have had an opportunity, if they desire, for full and effective judicial review. See *Medical Committee for Human Rights v. Securities Exchange Commission*, *supra*, 39 U.S.L.W. at 2039; *Schatten v. United States*, No. 19,233 (6th Cir. 1969).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Caption omitted in printing]

ORDER

Before WEICK, CELEBREZZE and PECK, Circuit Judges.

Appellants have filed a petition for rehearing with a suggestion that it be heard in banc. A vote of the Circuit Judges in regular active service was taken at the request of Judge Celebrezze, but only he and Judge McCree voted in favor of an in banc hearing, and it was not ordered. The petition for rehearing is therefore properly before the panel for disposition.

On page 2 of the petition for rehearing is contained the following statement:

"1. On page 7 of the majority opinion, Judge Weick states:

'Mr. Swick's assertions that the necessary determinations were made and the reasons therefore are unchallenged by any evidence, and there is nothing to indicate that his statements could be disputed at a trial.'

The statement disregards the following *competent evidence* produced by appellants:

"(a) Challenging Mr. Swick's assertions that Secretary Volpe determined that there were no feasible and prudent alternatives, Arlo I. Smith, who has followed this controversy closely, has researched the activities of the Department of Transportation and was in frequent communication with officials of that Department, stated in paragraph 28 of his affidavit (App. No. 3)* that:

'... defendant Volpe has made no finding that there is no feasible and prudent alternative to the use of such public park and recreation areas.' "

(Emphasis added)

The above-quoted portion of the affidavit of Arlo I. Smith is certainly positive, but the trouble is that the ellipsis therein indicates that something was omitted therefrom. An examination of Smith's affidavit in the record, for the purpose of ascertaining the omission, reveals that the portion omitted reads as follows: "On information and belief." (App. No. 3 para. 28).

Thus by restoring the omitted words to the quoted portion of Smith's affidavit, it is clear that his statement was based, not on personal knowledge, but only on information and belief. The affidavit therefore did not contain competent evidence to be considered in opposing a motion for summary judgment. It could not contradict the positive statement of facts contained in Mr. Swick's affidavit. Rule 56(e) Fed.R.Civ.P.; *Schoenbaum v. Firstbrook*, 405 F.2d 200, 209 (2d Cir. 1969); cf. *Bsharah v. Eltra Corp.*, 394 F.2d 502 (6th Cir. 1968).

In our opinion, the District Court did not abuse its discretion in denying discovery for the purpose of probing the mental processes of the Secretary. *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Sears, Roebuck & Co. v. N.L.R.B.*, ___ F.2d ___ (6th Cir. 1970); *Braniff Airways, Inc. v. C.A.B.*, 379 F.2d 453, 462 (D.C. Cir. 1967).

Appellants rely on an unreported 82-page opinion in the case of *D.C. Fed'n of Civic Ass'ns, Inc. v. Volpe*, (D.D.C. No. 2821-69, 1970), which involved the Three Rivers Bridge project and alleged political pressures not present here. In that case the District Court narrowly restricted the decision of the Supreme Court in *Morgan* and permitted interrogation of Secretary Volpe, which did indeed probe his mental processes. Until such time, however, as the Supreme Court restricts its opinion in *Morgan*, which we believe is unambiguous, we will follow it. The District Court in *D.C. Fed'n of Civic Ass'ns, supra*, did seem to agree with Chief Judge Brown, stating: "As discussed above, there is no requirement that the Secretary publicly articulate his § 138 determination." In that case the Court merely required the

Secretary to make "at least a mental finding." *Id.* n.30. Secretary Volpe testified that he did make the determinations required by Section 138 and the District Court credited his testimony; *id.* at 28.

Mr. Swick's affidavit relates what Secretary Volpe did to minimize harm. It states:

"Further, the Secretary of Transportation, in approving this project has particularly required that maximum planning be done to minimize harm to the park. [Exhibit C]. The features of this plan include, among others:

—Depression of the roadway to the maximum extent possible consistent with the requirements of drainage and possible safety in the area.

—A pedestrian crossing over the highway in the area of the zoo with a lower crown and a broad, natural looking aspect that blends with the surroundings and provide for a visual continuity.

—Exploration of other pedestrian crossings.

—Continual study of beautifying the parkway to conform with landscaping to architectural renderings reviewed by the Secretary of Transportation.

"The State has agreed to this planning to minimize harm to the park.

"With the exception of a seven-mile gap in I-40 in downtown Memphis, including Overton Park, this Interstate highway is open to traffic or nearing completion between Nashville, Tennessee, and Little Rock, Arkansas."

Conclusory statements in Smith's affidavit are unacceptable. *Bsharah v. Eltra Corp.*, *supra*.

No competent evidence was presented to the District Court or to this Court to impeach the affidavit of Mr. Swick.

Appellants have attached to their petition for rehearing Exhibit "A", which purports to be a photocopy of letter

dated August 21, 1970, from the Department of Highways of the State of Tennessee, to Mr. Frank Jordan, Chairman of Mid-Memphis Improvement Association. Since this letter was not in evidence, it is not properly before us and it is ordered stricken from the petition for rehearing.

The petition for rehearing is denied. The application for a stay is denied. Judge Celebreeze dissents.

Entered by order of the Court.

/s/ Carl W. Reuss,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Caption omitted in printing]

JUDGMENT

APPEAL from the United States District Court for the Western District of Tennessee;

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiffs-Appellants the costs on appeal, as itemized below, and that execution therefore issue out of said District Court.

Entered by order of the
Court.

/s/ Carl W. Reuss
Clerk

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

MONDAY, DECEMBER 7, 1970

1066 - CITIZENS TO PRESERVE OVERTON PARK, INC.
V. VOLPE

The application for a stay presented to Mr. Justice Stewart, and by him referred to the Court, is granted pending the issuance of the judgment of this Court. Treating the application for a stay and the briefs in opposition as a petition for a writ of certiorari and opposition thereto, certiorari is granted and the case is set for oral argument on Monday, January 11, 1971. Briefs for the petitioners shall be filed by December 21, 1970, and briefs for the respondents shall be filed by January 4, 1971. These briefs may be typewritten if counsel are unable to file printed briefs by these dates. The motions of the Committee of 100 on the Federal City, Inc.; and the City of Memphis et al., for leave to file briefs, as *amici curiae*, are granted. Mr. Justice Douglas took no part in the consideration or decision of these matters.

Supreme Court of the United States

No. 1066 ---- , October Term, 19 70

Citizens to Preserve Overton Park,
Inc., & al.,

Petitioners,

v.

John A. Volpe, Secretary, Department of
Transportation, et al.

ORDER ALLOWING CERTIORARI. Filed December 7, 1970.

Treating the application for a stay as a petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, certiorari is granted and the case is set for oral argument on Monday, January 11, 1971. Briefs for the petitioners shall be filed by December 21, 1970, and briefs for the respondents shall be filed by January 4, 1971. These briefs may be typewritten if counsel are unable to file printed briefs by these dates.

Mr. Justice Douglas took no part in the consideration or decision of these matters.

In the Supreme Court of the United States

OCTOBER TERM, 1970

CITIZENS TO PRESERVE OVERTON PARK, INC., WILLIAM
DEUPREE, SR., AND SUNSHINE K. SNYDER, PETITIONER

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION AND
CHARLES W. SPEIGHT, COMMISSIONER, TENNESSEE
DEPARTMENT OF HIGHWAYS

ON APPLICATION FOR STAY PENDING PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF TRANSPORTATION IN OPPOSITION

Petitioners seek, pending the filing and disposition of their petition for a writ of certiorari, to enjoin the Secretary of Transportation and the Commissioner of the Department of Public Highways of the State of Tennessee, from constructing a portion of an interstate highway passing through Overton Park, a 342-acre public park in Memphis, Tennessee. After memoranda in opposition were filed on behalf of the Secretary and the Tennessee Highway Commissioner

(1)

respectively, this Court, by order of November 20, 1970, set the matter for oral argument on December 7, 1970.

1. The case concerns approval by the Secretary of Transportation, pursuant to 23 U.S.C. 138, of a portion of Interstate Route I-40 passing through Overton Park. The highway is being built as a cooperative federal-state venture under the Federal-Aid Highway Act, 23 U.S.C. 101, *et seq.*, which prescribes federal grants to the states of 90 per cent of highway costs to facilitate "the prompt and early completion of the National System of Interstate and Defense Highways" (23 U.S.C. 101(b), 120(c)). Under the statute, the states "to the greatest extent possible" select the different routes, subject to the approval of the Secretary of Transportation (23 U.S.C. 103(d)), and submit "such surveys, plans, specifications, and estimates * * * as the Secretary may require," 23 U.S.C. 106(a). Moreover, the Act requires that a state highway department submitting plans for a route "involving the bypassing of, or going through, any city, town, or village * * * shall certify to the Secretary that it has had public hearings * * * and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community." 23 U.S.C. (Supp. V) 128(a).¹

¹ Procedural requirements for those hearings are set out in Policy and Procedure Memorandum 20-8 of the Department of Transportation (23 C.F.R. 1, Appendix A).

In 1968, Congress amended the Federal-Aid Highway Act to add, *inter alia*, the following provision (82 Stat. 823, 23 U.S.C. (Supp. V) 138):

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

The effective date of this section was August 23, 1968 (82 Stat. 836).²

On December 2, 1969, petitioners brought suit in the United States District Court for the District of Columbia asserting that the Secretary had failed to comply with this provision and thus should be enjoined from releasing federal funds to the Tennessee Highway Department for the Overton Park project.³ The action was transferred to the United States District Court for the Western District of Tennessee, where Commissioner Speight was added as a defendant, and on February 6, 1970, that court denied petitioners' motion for preliminary injunction and granted summary judgment to the respondents. A divided court of appeals affirmed and dissolved an injunction pending appeal which it had previously granted. It denied a petition for rehearing *en banc* and an application for stay.

2. For petitioners to succeed on the instant stay application, they must demonstrate that the issues to be presented in their proposed petition for a writ of certiorari are such as to warrant further review by this court. We submit that on this record no such showing can be made.

The determination that Interstate Route I-40 should pass through Overton Park was originally made by the

² This same provision is contained in the Department of Transportation Act, 49 U.S.C. 1653(f), and has been a part of that statute, in slightly amended form, since 1966 (80 Stat. 933).

³ Petitioners also alleged procedural errors in the public hearings held by the Tennessee Highway Department, but those matters do not appear to be the object of the proposed petition.

Bureau of Public Roads⁴ in 1956, more than eleven years before enactment of section 138; the decision was reaffirmed in 1966, 1968, and 1969. (Affidavit of Edgar H. Swick, Deputy Director of the Bureau of Public Roads, at pp. 1, 2). Swick attested (Swick Aff., p. 1) that "[a]ll alternate alignments were rejected because of large displacements of persons, hospitals, schools, churches, and commercial establishments." As he further explained (Swick Aff., pp. 1-2):

For instance, the route immediately north of the park would have involved the taking of three schools, including Southwestern University and the largest high school in Memphis, plus churches attended by 4,000 people, industries, and the residences of more than 1,500 people. The route south of the park would have involved taking two schools, three churches attended by 7,500 people, 46 commercial establishments, residential units being occupied by over 3,000 persons and a hospital and home for the aged. Incidentally, the construction and right-of-way costs of the least expensive of these alternate routes would exceed the cost of the chosen route by many millions of dollars (*Ibid*).

In 1967, prior to passage of section 138, the Secretary authorized acquisition of the right-of-way on either side of the park, and most of that land has now been purchased and cleared. Virtually all of the 2,200 people living there have been displaced, and most of the buildings destroyed (Swick Aff., p. 3). Moreover, title to the affected park land—which amounts to 26 acres, or less than 8% of the total acreage—has already

⁴ At this time the Bureau of Public Roads was a part of the Department of Commerce. The Department of Transportation Act (49 U.S.C. (Supp. V) 1651 *et seq.*), which became effective on April 1, 1967, transferred the Bureau of Public Roads to the new Department of Transportation (49 U.S.C. (Supp. V) 1655).

been acquired by the State of Tennessee from the city of Memphis for \$2,000,000. By local ordinance, the city was required to invest this sum in other park land; accordingly, it spent \$1,000,000 to acquire a 160-acre golf course and expects to use the remainder to buy separate local park areas totalling 140 acres.⁵

The route chosen was designed to minimize damage to the park (Swick Aff., pp. 3-4). Thus, the highway is to follow the path of an existing bus road, presently 40 to 50 feet wide, widening it to from 250 to 450 feet, including a 40-foot wide landscaped median strip. The approved plan calls for the new roadway to be depressed below ground level so that traffic on the road will not be visible to users of the park; in one area, however, where the highway crosses a creek, it will not be depressed, since to do so would cause serious drainage problems.⁶

On November 5, 1969, the Secretary again approved the plans for the Overton Park highway as outlined above (see pp. 11-12, *infra*). A proposal that the interstate road be tunneled under the park was unacceptable because the cost would have been about \$107,000,000, as compared to \$3,500,000 for the depressed route; moreover, it presented difficulties of construction, drainage, concentrated air pollution at ventilation points, and traffic safety. Another proposal that the highway be built in a cut and covered at ground level was unsatisfac-

⁵ An additional \$209,200 paid to the city by the state for construction of certain parking areas and the moving of a wooden pavilion and various utilities has been spent by the city to improve the park's zoo (Swick aff., pp. 5-6).

⁶ A pedestrian crossway is planned at the zoo, and other such crossways are under study (Swick aff., pp. 4-5, 6).

tory for similar reasons; it would have cost approximately \$41,500,000, and would not have preserved the original park vegetation (Swick aff., p. 3).

3. Petitioners assert on this application, as they did below, that (a) the Secretary's approval of the park route was erroneous because the Secretary failed to make specific written findings at the time he determined that "there is no feasible and prudent alternative" to the use of the park land for the highway and that the chosen route "includes all possible planning to minimize harm to [the] park", within the meaning of section 138; (b) the courts below erred in refusing to require the Secretary to testify concerning the actions he took pursuant to section 138, (c) the district court improperly considered only the evidence submitted by the Secretary in determining whether to uphold his determinations under section 138; and (d) it was error to grant summary judgment to the Secretary on the present record. None of these claims is deserving of review by this Court.

(a) It is undisputed that the Secretary, on the occasion of his 1969 approval of the Overton project, issued no written findings and wrote no opinion. However, there is nothing in the Federal-Aid Highway Act requiring him to have done so. In the absence of a Congressional mandate, such a requirement should not lightly be read into the statute. See *Sterling National Bank v. Camp*, No. 27,988, C.A. 5, decided August 27, 1970. It is instructive that the Administrative Procedure Act contains no such requirement. Indeed, grants-in-aid are

specifically excluded from that Act's rule-making requirements (5 U.S.C. (Supp. V) 553(a)(2)), and written findings and conclusions are called for only in "cases of adjudication required by statute to be determined on the record after opportunity for an agency hearing" (5 U.S.C. (Supp. V) 554(a)). The Federal-Aid Highway Act does not instruct the Secretary to hold a hearing before approving an interstate highway route;⁷ nor, for that matter, can the Secretary's determination of the proper route and design for a highway reasonably be considered an "adjudication" within the meaning of 5 U.S.C. (Supp. V) 554(a). Cf. *South Suburban Safeway Lines, Inc. v. City of Chicago*, 416 F. 2d 535, 540 (C.A. 7).

Petitioners maintain that without written findings by the Secretary, judicial review of his determinations are "frustrated." Such an argument is based on a faulty premise; it overlooks the essential fact that the evidence on which the determinations rest—i.e., the administrative record—is always open to scrutiny. Thus, where the Secretary's decision on a particular question is assailable as being in excess of discretion, dissatisfied persons have ample opportunity to ascertain that fact and present to the courts those portions of the administrative record substantiating their case. Such an opportunity was accorded petitioners in the instant case (see *infra*, p. 13), but, as both courts below held, they failed to introduce any evidence to support their claim; nor has there been any attempt

⁷ The statute, rather, requires the state highway department to hold a hearing under the terms of 23 U.S.C. 128.

to set out in their present application evidence that might tend to indicate the Secretary abused his discretion. Petitioners' attempt to overturn the determination of the Secretary has been frustrated not by the absence of written findings but rather by the paucity of evidence in support of their contentions.

At all events, this question is not one that need be considered by this Court. The Department of Transportation has adopted a new procedure concerning determinations made under section 138; since January 31, 1970, such determinations have been incorporated in formal memoranda signed by the Secretary which explain the reasons for the action taken. As of June 30, 1970, these written determinations have been made by the Federal Highway Administrator, and then submitted to the Secretary for his evaluation and concurrence.

(b) Petitioners next ascribe as error the refusal of the courts below to permit petitioners to compel the Secretary to testify as to "what actions he took under section 138" (Application for Stay, p. 7). To the extent that petitioners were seeking by this means "to ascertain the bases, if any, for [the Secretary's] determinations" (*id.*, p. 6), *United States v. Morgan*, 313 U.S. 409, bars any such inquiry. In that case, the Secretary of Agriculture had been "questioned at length regarding the process by which he reached the conclusions of his order [under the Packers and Stockyards Act, 7 U.S.C. 181 et seq.] * * *." 313 U.S. at 422. This Court there held (*ibid*):

* * * [T]he short of the business is that the Secretary should never have been subjected to this examination. * * * We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." 304 U.S. 1, 18. Just as a judge cannot be subjected to such a scrutiny * * *, so the integrity of the administrative process must be equally respected. * * *

Petitioners rely extensively upon *D.C. Federation of Civic Associations, Inc. v. Volpe*, No. 2821-69, D.D.C., decided August 23, 1970, as presenting a conflict with the instant court of appeals' decision that should be reviewed by this Court. But there is no occasion for this Court to review the asserted conflict between the decision of the court of appeals on this point and the decision of the District Court for the District of Columbia. Rule 19(1)(b) of the Rules of this Court. Indeed, earlier in the *D. C. Federation* litigation, the Court of Appeals for the District of Columbia Circuit had refused to issue a writ of mandamus compelling the district judge to permit the taking of the Secretary's oral deposition, stating (slip. op. p. 2), "ordinarily a cabinet officer should not be subjected to oral deposition." *D. C. Federation of Civic Associations v. Sirica*, No. 24,216, C.A.D.C., decided May 8, 1970. Thus, the subsequent decision of the district court upon which petitioners rely here, compelling the Secretary's testimony at trial, did not even comport with the view of the D.C. Circuit as earlier expressed in the same litigation. And see *Braniff Airways, Inc. v. C.A.B.*, 379 F. 2d 453, 460-461 (C.A.D.C.).

In any event, the district court decision in that case is not in point, for in the peculiar circumstances there

presented (see slip. op. pp. 13-20), some doubt existed whether the Secretary had actually made the determinations required by section 138; the plaintiffs were thus permitted to compel Secretary Volpe to testify on that point. In contrast, we do not have here any suggestion that the Secretary acted in response to political pressures or in bad faith, as was the charge in the District of Columbia case; nor are we without the "contemporaneous written record" that was missing in *D.C. Federation*. The record in the present case contains a press release dated November 5, 1969, announcing the Secretary's approval of the route through Overton Park (Swick aff., exhibit C).⁸ That release states specifically that the "plan for Overton Park is the most reasonable open to [the Department of Transportation]," pointing

⁸ Petitioners' efforts below to show that the Secretary made no determination as to feasible and prudent alternatives centered primarily on the testimony before the Senate Subcommittee on Roads of Lowell L. Bridwell, the former Federal Highway Administrator, who approved the route in 1968. Bridwell there stated that he asked the Memphis City Council to consider the alternatives, urging them "to focus upon the conflicting set of community values that are inherent in this kind of situation." This testimony, rather than reflecting a delegation by the Secretary of his duty to the local authorities, indicates complete compliance with the statute. As noted below (Application for Stay Ex. B, p. 8-9), the legislative history of the statute makes it clear that local preferences are to be considered: "This amendment of both relevant sections of law is intended to make it unmistakably clear that *neither* section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that clearly enunciated local preferences should be overruled on the basis of this authority." Conf. Comm. Rep. No. 1799, 90th Cong., 2d sess., p. 32.

out that "[t]he options of [the Secretary] were few, mainly because the route of the highway had previously been determined." Moreover, it is clear from the release that the Secretary conditioned his approval on modifications in the plan to minimize harm to the park, such as depressing the roadbed and building pedestrian crossings.⁹ There is, then, no cause for this Court to review the decision below in light of the holding of the District Court for the District of Columbia in *D.C. Federation*, which was based on materially different circumstances.

(c) Petitioners' contention that the Secretary should have submitted to the district court the entire "administrative record" upon which he acted is equally without merit. In particular, petitioners take issue with the Secretary's failure to introduce "reports which the Tennessee Highway Department was required to file analyzing alternative routes and designs" (Application for Stay, p. 4). If this information had been otherwise unavailable to petitioners in these proceedings, so that the Secretary might be open to the charge of secreting material favorable to petitioners' cause, the argument might have some substance.¹⁰ However, such is clearly not the case.

⁹ In *D.C. Federation*, *supra* (slip op. p. 25, n. 31), the district court had stressed that a press release issued by the Secretary in that case had not specifically mentioned his determinations under section 138. The court there—erroneously, in our view—rejected the government's contention that this should be inferred from the Secretary's overall approval of the bridge project. The court ultimately found that the Secretary had fully complied with section 138 (slip. op. pp. 28-36).

¹⁰ This was precisely the charge made in *Garvey v. Freeman*, 397 F. 2d 600 (C.A. 10), noted in the margin of petitioners' application (Application for Stay, p. 8). See generally 6 Moore, Federal Practice, 2397 (2d ed. 1966).

The Department of Transportation advises us that in January, 1970, Mr. John W. Vardaman, counsel for the petitioners, asked, and was granted permission, to inspect the Department file on the routing of Interstate Route I-40 through Overton Park. He thereafter personally inspected the administrative record and was even asked if he wished to have copies made of any of the documents; he did not. Thus petitioners' counsel had full access to all the discoverable documentary material on which the determination to approve the route through Overton Park was based.¹¹ Nothing precluded petitioners from introducing all or part of the record in the district court to substantiate their claim. Having chosen not to do so, it is difficult to understand how petitioners can assert they have been harmed by the Secretary's failure to submit an "administrative record".

(d) Finally, petitioners seek a stay in order to ask this Court to review for a third time the same evidence considered by both courts below, hoping that it

¹¹ The reports of the Tennessee Highway Department, written pursuant to Policy Procedure Memorandum 20-8, paragraph 10.b(1) (23 C.F.R. 1, Appendix A), had been submitted to the Secretary in connection with the public hearings. Policy Procedure Memorandum 20-8, paragraph 10.b(1)-(4) (*ibid.*). Moreover, these documents were also available for public examination at the office of the Bureau of Public Roads, Engineers Division, Nashville, Tennessee in accordance with 5 U.S.C. (Supp. V) 552(a)(2), and petitioners' counsel had been so apprised. Finally, copies of these same documents were on file for public inspection at the office of the State Regional Right-of-Way Engineer, State Office Building, Memphis, Tennessee, and notice to this effect had been published in the local newspaper pursuant to Policy Procedure Memorandum 20-8, paragraph 10.c (*ibid.*).

will find the determinations of the Secretary arbitrary and capricious (see 5 U.S.C. (Supp. V) 706(2)(A))¹² where the other courts did not. Such a review of evidence is not a proper basis for granting a petition for a writ of certiorari. In any event, the findings below—that petitioners' affidavits failed to raise any substantial question of fact—were entirely correct.

As we earlier indicated, Edgar H. Swick, in his affidavit submitted on behalf of the Secretary,¹³ set forth with some specificity the difficult problems of displacement and dislocation inherent in the use of alternate routes (*supra*, pp. 5-6). These facts are undisputed by petitioners; significantly, they do not even suggest a possible alternate route. Nor do they dispute the fact that at the time Secretary Volpe made the determinations here in question, "the interstate route had been excavated up to either end of the park with the resulting disruption of homes and businesses that necessarily result whenever a major highway is routed through a city" (Application for Stay, Ex. B, p. 7).¹⁴ Moreover, the park land to be affected had already been acquired by the State of Tennessee (see

¹² That this is the proper scope of judicial review of action by an administrative agency is not here contested. See *Western Addition Community Organization v. Weaver*, 294 F. Supp. 433, 437 (N.D. Calif.); *Board Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650, 659-660 (S.D. N.Y.); *D.C. Federation of Civic Associations, Inc. v. Volpe*, *supra*, slip. op. pp. 7-8; and see 49 U.S.C. (Supp. V) 1655(h).

¹³ The Secretary is authorized to act through delegates. 49 U.S.C. (Supp. V) 1657(e)(1).

¹⁴ As pointed out below, "[e]ven assuming that the Secretary was not aware of this condition, the court could not ignore the social and economic impact of changing the route at this late date" (Application for Stay, Ex. B, p. 8).

supra, pp. 5-6). To conclude in these circumstances that there existed "no feasible and prudent alternative" to the Overton Park route is neither arbitrary nor capricious. Any other decision would, as the court below properly noted, not only have resulted in "additional disruption, but that [disruption] already caused would have been futile and wasteful." (Application for Stay, Ex. B, p. 7). Manifestly, this was neither the intent nor the purpose of Section 138. As explained in the Report of the Senate Committee on Public Works (S. Rep. No. 1340, 90th Cong., 2d sess., p. 19):

The committee would further emphasize that while the areas sought to be protected by section 4(f) of the Department of Transportation Act and section 138 of title 23 are important, there are other high priority items which must also be weighed in the balance. The committee is extremely concerned that the highway program be carried out in such a manner as to reduce in all instances the harsh impact on people which results from the dislocation and displacement by reason of highway construction. Therefore, the use of park lands properly protected and with damage minimized by the most sophisticated construction techniques is to be preferred to the movement of large numbers of people.

The issue, then, turns in the final analysis on whether the approved plan included "all possible planning to minimize harm" to the Park, within the meaning of Section 138. On this point, petitioners have suggested two possible alternatives to the depressed highway design actually selected: a bored

tunnel and a cut and cover tunnel. Swick's affidavit demonstrates conclusively that both alternates were considered carefully before being rejected. While the marked difference in cost was one significant factor prompting the Secretary's rejection (*supra*, pp. 6-7), also relevant were the following considerations: park vegetation could not be preserved if a cut and cover tunnel was chosen; under either alternative, air pollution problems would be created at the tunnel vents; the underground roadways presented additional traffic hazards; and serious drainage and construction problems were presented by a creek running across the proposed right-of-way.

The affidavits introduced by petitioners do not dispute these findings, nor do they suggest other alternatives that might not have been considered by the Secretary. Rather, as observed below (Application for Stay, Ex. B, p. 10), they challenge only "the wisdom of the choice." Thus, on the basis of the record before them, the courts below could properly ascertain whether the Secretary's choice of the depressed highway design was arbitrary or capricious.¹⁵

¹⁵ In determining whether the proposed plan included "all possible planning to minimize harm" to the park, the court below properly held that the word "'possible' must be interpreted within the bounds of wisdom and reasonableness" (Application for Stay, Ex. B, p. 10).

Plainly, it was not for them to substitute their judgment for that of the administrative agency. As this Court held in *Berman v. Parker*, 348 U.S. 26, 35: "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area." And see *Nashville I-40 Steering Committee v. Ellington*, 387 F. 2d 179, 185 (C.A. 6), certiorari denied, 390 U.S. 921. This applies with equal force to the design of the highway. The question is whether the ultimate decision, viewed in the light of all competing factors, was arbitrary. Here, it clearly was not, and the courts below properly so found.

There is, then, no occasion for further review by this Court, and the stay application should be denied. While this may seem harsh in view of the short delay requested, petitioners have failed to give any reason for this Court to believe that a further delay will serve to prevent the construction of Interstate Route I-40 through Overton Park. In these circumstances, no purpose can be served by granting the relief here requested.

The application for a stay should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

No. 1066

Application for stay
granted by Court on
December 7, 1970 treated
as petition for writ of
Certiorari.

Opposition to stay treated
as opposition to petition
for Certiorari.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1066

CITIZENS TO PRESERVE OVERTON PARK, INC., WILLIAM
DEUPREE, SR. AND SUNSHINE K. SNYDER, PETI-
TIONERS

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, AND
CHARLES W. SPEIGHT, COMMISSIONER, TENNESSEE
DEPARTMENT OF HIGHWAYS

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT*

MOTION TO REMAND TO THE DISTRICT COURT

The Secretary of Transportation moves that this Court vacate the judgment of the court of appeals and remand this case to the district court with instructions to vacate the judgment granting respondent's motion for summary judgment for the purpose of enabling the Secretary of Transportation to introduce the entire administrative record on which his decisions were based.

This case was decided by the United States District Court for the Western District of Tennessee on respondents' motion for summary judgment; the record then before the court consisted only of affidavits, and attachments thereto, submitted by all the parties. A divided court of appeals affirmed the grant of summary judgment and denied a petition for rehearing *en banc* and an application for stay. On December 7, 1970, this Court, after hearing oral arguments, granted an application for stay pending issuance of its judgment, and, treating the stay application as a petition for a writ of certiorari, granted certiorari.

On further study of the record before the district court, it is our view that a determination (a) whether the Secretary did in fact make the findings called for in both the Department of Transportation Act of 1966 (49 U.S.C. (Supp. V) 1653(f)) and the Federal-Aid Highway Act of 1968 (23 U.S.C. (Supp. V) 138)), and, if so, (b) whether that determination was in this case arbitrary and capricious, should ^{on} the affidavits submitted, but should have been based not have rested on the administrative record that was before the Secretary at the time of his approval of the route and design of Interstate Route I-40 through Overton Park. Since that administrative record was not before the district court, a definitive decision should not be made by this Court on this record. A remand at this time is appropriate to make it possible to introduce the administrative record for judicial consideration.

The issue whether it was error to refuse petitioners' request to take the Secretary's deposition

will, of course, remain in the case, as will the question concerning the governing standard of review of the Secretary's action. However, these questions should not, in our view, be decided by this Court in the abstract, as would be necessary on the present record, but rather should, if they still exist after remand, be resolved on the basis of concrete facts. It is entirely possible that both issues will become moot on introduction of the administrative record, in that the basis for the Secretary's action might then be made clear and the district court might find that his determination not only meets the arbitrary and capricious test but also is supported by substantial evidence. If such is not the case, application can be made to bring these issues again to this Court, but on a more complete record.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

No. 1066

Responses to motion to
remand, etc., not printed.

E COPY

Supreme Court, U.S.

FILED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

E. ROBERT SEAVER, CLERK

No. 1066

CITIZENS TO PRESERVE OVERTON PARK, INC.,
WILLIAM W. DEUPREE, SR., SUNSHINE K. SNYDER,
SIERRA CLUB, and NATIONAL AUDUBON SOCIETY,

Petitioners,

v.

JOHN A. VOLPE, Secretary
Department of Transportation,
and
CHARLES W. SPEIGHT, Commissioner
Tennessee Department of Highways,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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638-6565

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January 19, 1971

JAN 21 1971

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Honorable E. Robert Seaver
Clerk, United States Supreme Court
Washington, D.C. 20543

Re: No. 1066, Citizens to Preserve Overton
Park, Inc., et al. v. John A. Volpe,
Secretary, Department of Transportation,
et al.

Dear Mr. Seaver:

I have discovered that in the printed Brief for Petitioners in this case the printer omitted a portion of a sentence which was included in the typewritten brief filed on December 21, 1970. The words omitted, which should come immediately before the first line on page 9 of the printed brief, are:

"Secretary, the final decision on the location was reached".

Thus the complete sentence which begins on the last line of page 8 and ends on page 9 should read:

"By April, 1968 when, according to the Secretary, the final decision on the location was reached '[m]uch of the right of way leading to the park already ha[d] been purchased.' (A. 36)."

Would you please distribute copies of this letter to the Court.

Very truly yours,

John W. Vardaman - Jr.
John W. Vardaman, Jr.

cc: Honorable Erwin N. Griswold
J. Alan Hanover, Esq.

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OCTOBER TERM, 1970

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the district court (A. 165-74)¹ is reported at 309 F. Supp. 1189. The opinion of the court of appeals (A. 177-94) and its order denying both rehearing and petitioners' application for stay A. 195-98 are unpublished.

JURISDICTION

The judgment of the court of appeals was entered November 17, 1970. (A. 198). This Court granted the petition

¹"A." refers to the Appendix filed in this Court.

for a writ of certiorari on December 7, 1970. (A. 199). Jurisdiction of this Court to review the decision below rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are the Department of Transportation Act § 4(f), 49 U.S.C. § 1653(f) (Supp. III), 80 Stat. 933 which provides:

“The Secretary shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge or historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge or historic site resulting from such use.”

and 49 U.S.C. § 1653(f) (Supp. V) (82 Stat. 823) amending 49 U.S.C. § 1653(f) (Supp. III) and 23 U.S.C. § 138 (Supp. V) (82 Stat. 823) which are identical and provide:

“It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which

requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

QUESTIONS PRESENTED

1. Whether the Secretary of Transportation sufficiently complied with 49 U.S.C. § 1653(f) and 23 U.S.C. § 138 in approving this highway without making any record of a determination that there are no feasible and prudent alternatives to the use of a public park and that the design includes all possible planning to minimize harm to the park?
2. Where the Secretary has not made a record of any determination under sections 1653(f) and 138, whether this Court's decision in *United States v. Morgan*, 313 U.S. 409 (1941), prohibits interrogation of a former Federal Highway Administrator to ascertain what determinations, if any, were made under those sections and the basis for any determinations?
3. Whether the courts below could properly review the Secretary's approval of this highway without reference to the full administrative record on which the Secretary acted, but rather on the basis of affidavits prepared for this litigation?
4. Whether the courts below were correct in holding that the petitioners were required to show that the Secretary's approval of this highway was arbitrary and capricious in order to obtain relief?

5. Whether the record contains disputed issues of material fact, relevant to a review of the Secretary's actions, which make the district court's grant of summary judgment for respondents erroneous?

STATEMENT

On November 5, 1969 the Secretary of Transportation announced final approval of a proposal to construct a six-lane interstate highway through Overton Park in Memphis, Tennessee. Promptly thereafter, petitioners (a Memphis conservation organization, two residents of Memphis, the Sierra Club and the National Audubon Society) filed this action seeking to enjoin construction of the highway on the ground that the Secretary had not complied with statutes designed to protect public park lands and recreation areas such as Overton Park. 49 U.S.C. (Supp. III) § 1653(f) and 23 U.S.C. (Supp. V) § 138. (A. 4-13). Those statutes require that public parks such as Overton Park not be used for federal-aid highways unless there is no "feasible and prudent alternative" and that, if the park is used, the design include "all possible planning to minimize harm" to the park.

Overton Park is a publicly owned 342-acre park. It is the outstanding park in Memphis and has been described as one of the most beautiful city parks in the country.² The park contains a zoo, a nine-hole municipal golf course, an outdoor theatre, nature trails, a bridle path, an art academy, picnic areas, and 170 acres of oak-hickory climax forest. It was estimated by the zoo director that in 1967 approximately 1-1/2 million people visited the zoo. (A. 15).

The six-lane interstate highway will literally cut Overton Park in two. It will require a right-of-way varying between 250 and 450 feet through the entire width of the park, cutting a swath through a wooded area, passing immediately

²See, e.g., A. MOWBERRY, ROAD TO RUIN, 36-37 (1969).

adjacent to a small, picturesque lake, then running along one side of the zoo. At least 26 centrally located acres of park land will be destroyed, and a far greater area will be affected. As presently designed, a substantial segment of the highway will be at or above ground level, exposing park users to the pollution, blight and din of vehicular traffic moving at high speeds. Department of the Interior officials have stated publicly that "Once the park has been separated by the expressway its values have been seriously impaired," and "Regardless of what type of surface design is followed there won't be much in the way of a wooded park left in Overton Park after an interstate highway is routed through it."³ (A. 46, 50).

The general procedure followed by the states and the Department of Transportation in planning and approving federal-aid highways is for the state to select, preliminarily, the route location, which is then approved by the Secretary of Transportation. The state and the Secretary then determine the design of the highway. Before the state selects the route and the design, it is required by the Federal-Aid Highway Act and Department of Transportation Regulations to hold public hearings on the location and the design, and to submit the transcript of those hearings to the Secretary for his consideration in approving or rejecting the state's proposals. 23 U.S.C. § 128; 23 C.F.R., Chap. 1, pt. 1, App. A (1970). Once the design has been approved, the Secretary approves the "surveys, plans, specifications and estimates" and thereby obligates the United States to reimburse the state for up to 90 percent of the cost of the highway. 23 U.S.C. § 106.

It is apparently undisputed that the Secretary gave final approval under 23 U.S.C. § 106 to the highway through

³ Respondents imply that this six-lane interstate highway will have little or no effect on the park because it will follow the present route of a bus lane. They fail to point out, however, that the bus lane is a narrow, unobtrusive facility, approximately 25 feet wide, infrequently used and crossed freely by pedestrians. (A. 114).

Overton Park in November, 1969. The Secretary has argued that the location of the highway was finally determined in April, 1968. (Oral Argument on Stay Application). The facts relevant to that approval are as follows. By resolution of March 5, 1968, the Memphis City Council opposed location of the highway in the park. On April 3, 1968 then Federal Highway Administrator Bridwell met with the Memphis City Council. According to then Secretary of Transportation Boyd, Bridwell "told members of the Council that the Department of Transportation had no final decision on the location of the route." (A. 24) Bridwell said to the City Council:

"Yes there are alternatives. . . ."

"We told them that a highway could be built through the area on almost any conceivable line that they could pick, that engineeringly it was feasible. . . ." (A. 65)

Mr. Bridwell discussed an alternative that was located immediately north of the park and one located immediately south of the park. He then said "we left it completely in the hands of the city council to choose anything they wanted to choose. . . ." ⁴ On April 4 the City Council reversed its prior resolution and approved the route through the park. On April 19, 1968 the Department of Transportation concurred in that approval. During the argument before the district court, appellants specifically offered to prove through the deposition of Mr. Bridwell that he never determined that the alternative routes discussed with the City Council were not feasible and prudent. (A. 162)

⁴The account of Mr. Bridwell's meeting with the Memphis City Council is taken from his testimony before the Subcommittee on Roads of the Senate Committee on Public Works concerning the planning of this highway. *Hearings on Urban Highway Planning, Location, and Design Before the Subcommittee on Roads of the Senate Committee on Public Works*, 90th Cong., 1st and 2d Sess., pt. 2, pp. 478-80 (1968). The relevant portions of his testimony are part of the record in this case. (A. 63-66).

The Secretary has attempted to justify the rejection of the alternatives described by Bridwell on the ground that they would displace a large number of people, some commercial establishments, churches and schools, and otherwise affect many individuals. (A. 27). In comparing the number of persons who would be affected by the various alternatives, however, respondents excluded any consideration of the millions of people who use Overton Park annually. Their calculations were restricted to the displacement of residences, commercial institutions, churches and schools. Even then, according to their own calculations, without consideration of the effect upon those who use the park, the present route will displace or affect more people than the alternative to the north of the park and nearly as many as that to the south.⁵ Respondents offer no expla-

⁵The following tables contain respondents' calculations as to the effect of the route through the park and the alternatives to the north and south.

Original Line Through Overton Park

Residential Units	412 = 2292 people
Commercial & Industrial	30 = 295 people
Churches	4 = 20 (actually employed) 5600 affected
Schools	None — 0
Total	2607 people

Line "B" (North)

Residential Units	428 = 1563 people
Commercial & Industrial	125 = 638 people
Churches	5 = 60 (actually employed) 4000 affected
Schools	3 = 125 (actually employed)
Total	2386 people

Line "A" (South)

Residential Units	771 = 3065 people
Commercial & Industrial	46 = 1300 people
Churches	3 = 75 (actually employed) 7500 affected
Schools	2 = 80 (actually employed) 2000 affected
Hospitals & Homes for Aged	1 = 200 people
Total	4720 people (A. 69-70; 145-46)

nation why they chose the route through the park even though it displaced or adversely affected more people than the alternative to the north.

The alternatives suggested by Bridwell were not the only ones available. Petitioners submitted an affidavit of an expert in transportation planning who outlined two additional alternatives which the Secretary apparently never considered. (A. 92-98).

Although the alternative routes would be more costly than the route through the park, this does not appear to have been a factor in their rejection. (A. 27). In any event the costs of the alternatives are within the range of costs for interstate highways approved by the Secretary in other urban areas. (A. 79-80). The higher costs result from the fact that a right-of-way through a public park is generally cheaper than one requiring condemnation of residences or businesses—a factor which has led some to conclude that planners use parks as routes for highways because of their cheaper cost.⁶

In May, 1967, more than two years before the final approval of the segment of Interstate 40 that passes through the park, and more than a year before Bridwell's 1968 approval, the Department of Transportation authorized the state to begin acquiring the right-of-way leading to either side of the park.⁷ By April, 1968 when, according to the

⁶The federal government is obligated to provide 90 percent of the cost of this highway and the funds are taken from the multibillion dollar Highway Trust Fund which may be used only for federal-aid highway projects. Highway Revenue Act of 1956 § 209, as amended, 23 U.S.C. § 120, *note* (1964) and (Supp. II 1967). Thus to the extent that money may be saved by using the present route and design, it means only that the Trust Fund has some additional funds to use for other federal-aid highway projects.

⁷The court of appeals was in error in stating that the right-of-way had been excavated to either edge of the park. The right-of-way has been cleared but there is no excavation or construction within 1.2 miles of the park on either side. Also the acquisition of right-of-way began in 1967 and was not, as the court of appeals stated, completed by 1967. (A. 28).

"[m]uch of the right of way leading to the park already ha[d] been purchased." (A. 36). The court of appeals held that this acquisition of right-of-way leading to the park rendered any alternative routes unreasonable and that respondents had thus presented a *fait accompli* which prevented judicial review of the Secretary's decisions with respect to alternative routes. *Compare Citizens Committee for the Hudson Valley v. Volpe*, 302 F. Supp. 1083, 1090 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir.), *cert. denied*, ____ U.S. ____ (December 7, 1970). However, the record is disputed on that point and the court of appeals erred in resolving that conflict since the case was on appeal from a summary judgment. The affidavit of petitioners' expert in transportation planning explained that the present state of right-of-way acquisition has not made consideration and selection of alternative routes inappropriate and that selection of an alternate would be beneficial. (A. 94-97). Furthermore since the right-of-way was acquired with knowledge (a) that there was no final approval of the route through the park, (b) that there was substantial controversy over that route and (c) that litigation was likely if it were approved, this should not immunize a decision of the Secretary of Transportation from judicial review.

The design was approved by the Secretary of Transportation in November, 1969. A substantial portion of the highway will be at or above ground level as it passes through the park. Although one segment will be slightly depressed, as it approaches a small creek slightly west of the park, the highway rises to 5-6 feet above ground level, and is thus exposed to those who use the park.

The Secretary rejected a number of alternative designs all of which are technologically possible and which would, according to officials of the Department of the Interior, minimize harm to the park. For instance, the highway could be placed in a bored tunnel, or a cut and cover tunnel—which is a fully depressed route covered after construction. It is conceded that the Overton Park area is favora-

ble for a cut and cover tunnel.⁸ (A. 140). Another design which could have been selected was a fully depressed design covered in certain areas of the park. The Secretary apparently rejected this because in order for the small creek to drain under a depressed road, it would be necessary to install pumps or use a siphon. Both of these drainage devices, admittedly possible here (A. 123-24), are standard engineering techniques in common use throughout the United States today. (A. 76-77). The type of pump which would be required here has been used frequently to overcome similar drainage problems in the interstate highway system. The record contains no evidence as to the cost of a fully depressed, partially covered design.

Proceedings Below

Petitioners filed this action promptly after final federal approval was granted. (A. 4-13). Secretary Volpe filed a motion to dismiss. (A. 60). Pending a hearing on the motion to dismiss, he obtained a protective order which prevented petitioners from deposing former Federal Highway Administrator Bridwell and beginning discovery, pending decision on the motion to dismiss.⁹ (A. 74). At the hear-

⁸These two types of tunnels were apparently rejected because of their estimated costs, \$107,000,000 and \$41,500,000; because the Secretary did not believe they would minimize harm to the park; and because of alleged safety problems. There is no evidence in the record to substantiate either the cost estimates or any alleged safety hazards. Indeed evidence documenting the use of tunnels in the interstate system disputes the Secretary's suggestions that tunnels are too hazardous or too costly. (A. 78-79). Furthermore his suggestion that a tunnel would not minimize harm to the park is disputed by the statements of the officials of the Department of the Interior.

⁹During the course of the hearing on the Secretary's motion for a protective order, petitioners agreed to withdraw the notice of deposition in order not to delay the hearing on the motion for preliminary injunction and the motion to dismiss. They did not consent to a protective order. There was no indication that the motion to dismiss would be converted to a motion for summary judgment on

ing of the motions to dismiss and preliminary injunction, respondents moved for summary judgment. The evidence in the district court consisted entirely of affidavits. The affidavit of Deputy Director Swick of the Bureau of Public Roads was submitted on behalf of respondent Volpe. It purported to prove that the Secretary had determined pursuant to sections 1653(f) and 138 that there were no prudent and feasible alternatives to the park route and that the design included all possible planning to minimize harm. (A. 27-32). However, Exhibits A, B and C, referred to as the basis of the purported proof, contained no such determinations but were in fact unauthenticated letters and press releases. (A. 33-38). The Secretary did not submit the entire "administrative record" for review. For instance he failed to submit reports which the Tennessee Department of Highways was required to file analyzing alternative routes and designs.¹⁰ Petitioners submitted numerous affidavits which disputed most, if not all, of the factual assertions contained in the Swick affidavit.¹¹

Despite the fact that petitioners had not been able to begin discovery, and despite the fact that the Secretary did not submit the entire "administrative record" on which he

the day of the hearing and petitioners did not agree to postpone the deposition of Mr. Bridwell until after decision on a motion for summary judgment. The result of the protective order and the conversion, on the day of the hearing, of the motion to dismiss into a motion for summary judgment was that petitioners did not have an opportunity to take and offer the deposition.

¹⁰Paragraph 10.b(1) of the Bureau of Public Roads Policy and Procedure Memorandum 20-8, 23 C.F.R., Part I, Appendix A (1970) requires that when a state seeks approval for a route or design it must submit a report containing descriptions of "the alternatives considered and a discussion of the anticipated social, economic and environmental effects of the alternatives"

¹¹As stated above, the motions for summary judgment were not made until the date set for hearing on the motions to dismiss and the motion for preliminary injunction. Petitioners' affidavits had been submitted in support of the motion for preliminary injunction.

had acted, the district court granted respondents' motions for summary judgment and dismissed the action. (A. 174).

The court found that the Secretary had made no written determinations with respect to alternative routes and designs under sections 1653(f) and 138, but held that the statutes did not require the Secretary to do so. It then held, on the basis of the affidavits, that it was undisputed that such determinations had been made, although not recorded, and, based on undisputed facts which it did not specify in its opinion, held that such determinations were not arbitrary and capricious. (A. 165-74). 309 F. Supp. 1189 (W.D. Tenn. 1970).

Petitioners appealed and by a vote of 2-1 the court of appeals affirmed. (A. 177-94). In affirming, the court of appeals held, over the dissent of Judge Celebrezze:

(a) that even though the Secretary of Transportation was prohibited under sections 138 and 1653(f) from approving this project unless (1) there were no prudent and feasible alternatives and (2) unless the design included all possible planning to minimize harm to the park, and even though his approval was subject to judicial review, the Secretary complied with the statutes here despite the fact that he made no written findings or conclusions with respect to alternative routes or designs and produced no contemporaneous written evidence that he ever decided that there were no alternative routes or designs;

(b) even though the only evidence that the Secretary made any determinations under sections 1653(f) and 138 was an affidavit prepared after the fact by Mr. Swick, a subordinate in the Department of Transportation, petitioners were not entitled to engage in discovery to ascertain whether, as claimed by Mr. Swick, such determinations were in fact made and to ascertain the bases, if any, for those determinations; and

(c) that on the basis of affidavits before it, which were not the complete record on which the

Secretary acted, the Secretary was entitled to summary judgment on the question of whether he made the determinations required under sections 1653(f) and 138 and whether those determinations were arbitrary and capricious.

Judge Celebrezze dissented on the grounds that (a) there were numerous issues of disputed fact; (b) the district court and the majority of the court of appeals erred in attempting to review the Secretary's decisions under sections 1653(f) and 138 without either requiring the Secretary to produce the full administrative record on which he had acted or permitting petitioners to obtain it by discovery and submit it to the court; (c) in order for the courts to review the Secretary's determinations, the Secretary must make written findings and conclusions which he did not do in this case and (d) that the proper scope of review was whether the Secretary's decisions were supported by substantial evidence.

A petition for rehearing was referred to the court of appeals *en banc*. Judges McCree and Celebrezze voted to rehear but by a vote of 6-2 the full court denied the petition. The original panel entered a six-page order in which it acknowledged a conflict with a recent decision by the United States District Court for the District of Columbia over whether petitioners were entitled to engage in discovery against the Secretary and a former Federal Highway Administrator in challenging the decisions under sections 1653(f) and 138. The court denied petitioners' application for stay pending a petition for a writ of certiorari. Judge Celebrezze dissented. (A. 195-98)

On December 7, 1970 this Court granted certiorari and continued a stay which prevents construction of the highway pending judgment. (A. 199).

SUMMARY OF ARGUMENT

I

Sections 1653(f) and 138 require that before the Secretary of Transportation may approve a highway that affects a public park such as Overton Park, he must determine that there are no "feasible and prudent" alternatives and that the highway "includes all possible planning to minimize harm." The courts below held that the Secretary was not required to make any record of his determinations under those statutes. That holding frustrates any effective judicial review because without such a record a court has no basis on which to determine whether the Secretary made the determinations and, if so, the basis for them. Nor would a court have any basis for ascertaining what standards were used in making the determinations. Errors of law and fact could easily go undetected. Review on the basis of documents prepared solely for litigation is not sufficient because of the incompleteness of such documents, and because, under the decision below, petitioners would be barred from engaging in discovery to impeach the documents.

II

The court below held that *United States v. Morgan*, 313 U.S. 409 (1941), barred any examination of a former Federal Highway Administrator or the Secretary of Transportation to ascertain whether they made the determinations required by sections 1653(f) and 138 and, if so, the basis for those determinations. The court below misapplied *Morgan* because petitioners sought to discover *whether* decisions were made, not, as in *Morgan*, *how* they were made. Furthermore *Morgan* applies where officials act in a quasi-judicial capacity and thus has no application here.

III

The courts below erred in granting summary judgment for respondents on the basis of the affidavits submitted since those affidavits did not constitute the administrative record on which the Secretary acted. The Solicitor General has now conceded that this was error and that a remand is necessary.

IV

The court of appeals held that in challenging the Secretary's actions petitioners were not entitled to a *de novo* hearing and that they were required to prove that the Secretary's actions were arbitrary and capricious. This is contrary to the Administrative Procedure Act which prescribes the "substantial evidence" standard where there is before the court a record of a hearing required by statute. 5 U.S.C. § 706(2)(E). In this case there were statutory hearings with respect to the location and the design of this highway. Furthermore the court below offered no reason why the Secretary's determinations should be upheld if the administrative record on which he acted does not support them with substantial evidence.

V

The courts below erred in granting summary judgment for respondents because there are issues of disputed fact as to whether Secretary Volpe or his predecessors ever made the determinations required by sections 1653(f) and 138 and there are numerous issues of disputed fact relevant to a review of any such determinations.

ARGUMENT

Legislative History

Petitioners submit that the language of 49 U.S.C. (Supp. III) § 1653(f), *as amended*, 49 U.S.C. (Supp. V) § 1653(f) and 23 U.S.C. (Supp. V) § 138 is sufficiently clear that the Court need not resort to their legislative history. *E.g.*, *Camineti v. United States*, 242 U.S. 470 (1917). However, since those statutes are before this Court for the first time, we have included as an appendix to this Brief a discussion of their legislative history. This is particularly appropriate since the courts below relied on certain passages which, as we show in the appendix, are misleading and do not come from authoritative sources of legislative history. Furthermore the discussion in the appendix shows beyond question that the provisions relied upon by petitioners, found first in 49 U.S.C. (Supp. III) § 1653(f), and now contained in sections 1653(f) and 138, were effective April 1, 1967, over a year before final approval of the location of the route through Overton Park.

I. THE HOLDING OF THE COURTS BELOW THAT THE SECRETARY IS NOT REQUIRED TO MAKE A RECORD OF DETERMINATIONS UNDER SECTIONS 1653(f) AND 138 IS ERRONEOUS BECAUSE EFFECTIVE JUDICIAL REVIEW OF THOSE DETERMINATIONS IS NOT POSSIBLE WITHOUT SUCH A RECORD.

The Secretary of Transportation claims, and petitioners dispute, that he, or his predecessors, determined prior to approving the highway through Overton Park that there were no feasible and prudent alternatives and that the project includes all possible planning to minimize harm to the park. Yet it is undisputed that the Secretary did not make a record of the determinations, nor of any factual findings to support them, nor did he disclose what standards or criteria he used.

The courts below, while holding that sections 1653(f) and 138 require the Secretary to make those determinations, which are subject to judicial review, held that the Secretary is not required to make a record of his determinations. That holding makes any effective judicial review impossible. A court reviewing the Secretary's actions under those statutes must first determine whether the Secretary has made an affirmative inquiry into and considered all the facts relevant to alternative routes and designs. *E.g., Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969); *Udall v. FPC*, 387 U.S. 428 (1967). It must then determine whether, before approving the highway, he has in fact made a determination that there are no feasible and prudent alternatives and that the project includes all possible planning to minimize harm to the park. The court must decide whether the standards or criteria applied in making those determinations were the standards required by the statute and finally the court must determine whether the Secretary's determinations are supported by the evidence. A court cannot make such a review if all it has before it is the bare fact that the Secretary approved a highway through a park. That fact reveals nothing about whether the Secretary fully informed himself of all relevant facts; whether he made the determinations required by the statute; what standards he applied; or upon what evidence his determinations were based. The absence of any record of the Secretary's action under these statutes could easily result in a variety of legal and factual errors going undetected. For instance the Secretary's decision may be based on a completely erroneous view of the law (the Secretary may believe the law merely requires "consideration of alternatives") or a completely erroneous view of the facts (the Secretary may believe that the route which goes through the park disrupts or displaces fewer people than an alternative which avoids the park) or the Secretary may have employed erroneous standards

under the statute (he may have based his decision entirely upon the number of people displaced by the various routes and the comparative cost rather than upon considerations of preserving park lands).¹² Without a record of what the Secretary did and the basis for his actions, it would be difficult if not impossible to detect such errors, and with the exception of the most egregious cases where there could be no conceivable basis for the Secretary's determinations, the courts will be forced to accede to the Secretary's "expertise" or his "discretion." This would in effect be no review at all. As this Court said in *B. & O. R. Co. v. Aberdeen & R. R. Co.*, "[t]he requirement for administrative decisions based on substantial evidence and reasoned findings . . . alone makes effective judicial review possible . . ." 393 U.S. 87, 92 (1968). A number of other cases have emphasized that review of administrative decisions must be made on the basis of an articulated decision by the administrator. It is not sufficient that the court have after-the-fact rationalizations, prepared for litigation by counsel or subordinates, as to what the administrator might have done. The court must have before it a record which discloses what the administrator decided and the basis for his decision. *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-43 (1965); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *United States v. Carolina Carriers Corp.*, 315 U.S. 475, 489 (1942).¹³

¹²*Compare D.C. Federation of Civic Associations v. Volpe*, 316 F. Supp. 754, 784-87 (D.D.C. 1970), where discovery and trial revealed the Secretary's erroneous interpretation of regulations governing public hearings.

¹³In a particularly persuasive passage the Court said:

"Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory

There are a number of courts of appeals decisions emphasizing that an adequate record of administrative action is necessary for effective judicial review. In a recent case involving a refusal by the Secretary of Agriculture to act on a petition to suspend uses of DDT, the Court of Appeals for the District of Columbia held that "meaningful appellate review of the refusal to suspend DDT's registration is impossible in the absence of any record of administrative action. . . . Therefore, we must remand the case to the Secretary. . . ." *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1099-1100 (D.C. Cir. 1970). See also, e.g., *Greensboro-High Point Air. A. v. CAB*, 231 F.2d 517, 521 (D.C. Cir. 1956); *NLRB v. Capital Transit Co.*, 221 F.2d 864, 867 (D.C. Cir. 1955); *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 23 (D.C. Cir. 1950), cert. denied, 340 U.S. 952 (1951); *First Nat'l Bank v. First Nat'l Bank*, 232 F. Supp. 725 (E.D.N.C. 1964); aff'd in part sub nom. *First Nat'l Bank v. Saxon*, 352 F.2d 267 (4th Cir. 1965); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 387-89 (1968); H. M. HART & A. SACKS, *THE LEGAL PROCESS*, 175 (tent. ed. 1958).

If the Secretary is not required to make a record of his actions under these sections, a reviewing court will have to rely upon affidavits or documents prepared solely for litigation purposes or upon testimony given perhaps many months after the decision was made. Furthermore, under

process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.' *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 144. Hence that requirement is not a mere formal one. Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence." 315 U.S. at 489.

the court of appeals opinion, those attacking the Secretary's decision would be prevented from discovery or cross-examination to test the reliability and completeness of such documents or testimony. A full and proper judicial inquiry into the administration of these statutes is impossible on the basis of such incomplete documentation.

The hazards of reviewing administrative determinations on the basis of affidavits or memoranda prepared for litigation purposes is sharply illustrated by an incident in *D.C. Federation of Civic Associations v. Volpe*, 316 F. Supp. 754 (D.D.C. 1970). In that case Mr. Swick, the same Mr. Swick who submitted an affidavit here, submitted an affidavit purporting to document the Secretary's determinations under sections 1653(f) and 138. A memorandum attached to his affidavit explained in detail the basis for Secretary Volpe's decisions. At trial, one of the documents considered was that memorandum. In footnote 31, the district court discussed its value. It found that the document was prepared for litigation purposes and that the person who prepared it had no personal knowledge as to what decisions Secretary Volpe had made or the basis for them. He was merely speculating as to what the Secretary might have done. The district court concluded that the memorandum "is of little or no probative value on the question of compliance with § 138 by the Secretary." 316 F. Supp. at 770, fn. 31.¹⁴ Furthermore during the trial in that case an employee of the Department of Transportation suggested that something similar happened with respect to the documents involved in this case.¹⁵

¹⁴The Department of Transportation's lack of forthrightness has been noted in another recent case. *Triangle Improvement Council v. Ritchie*, 429 F.2d 423, 426 (4th Cir. 1970), Sobeloff, J. dissenting from a denial of rehearing *en banc*.

¹⁵During the trial Mr. Rex Wells, an official of the Bureau of Public Roads who is responsible for processing material relevant to compliance with section 138, testified that he prepared the memorandum referred to above. Wells admitted that although the document purported to explain what the Secretary had done with respect to a deci-

It has come to light in this litigation that the Secretary has now adopted a policy of recording determinations under sections 1653(f) and 138. (Memorandum for the Secretary of Transportation in Opposition, p. 9.) These are apparently contained in written formal memoranda prepared by the Federal Highway Administrator and submitted to the Secretary of Transportation. This administrative interpretation of the Secretary's obligations under these statutes is, we submit, entitled to the weight normally afforded an officer's interpretation of the statutes he is charged with administering, *e.g.*, *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965), and should be followed by this Court in this case.¹⁶

sion under section 138, it was prepared some two months after the purported decision and that in fact he, Wells, had no personal knowledge on which to base the memorandum. The court, somewhat incredulous at this procedure, asked Wells:

"THE COURT: Is this the only time you can recall that it was followed in this case?

"THE WITNESS: Well, there is something similar to this in I-40 in Memphis, but I am not just sure of the sequence of events." *D.C. Federation of Civic Associations v. Volpe*, United States District Court for the District of Columbia, Civil Action No. 2821-69, Transcript of Proceedings, Tuesday, June 9, 1970, p. 277.

¹⁶The Secretary's voluntary adoption of this policy does not diminish the need for a decision by this Court that such a record is required by statute. The Department of Transportation takes a light view of these internal policies and procedures. A recent amendment to the Department's Regulations states that with respect to policies and procedures promulgated by the Federal Highway Administrator for compliance with provisions of federal law:

"No such direction, policy, rule, procedure, or interpretation contained in a Federal Highway Administration order or memorandum shall be considered a regulation or create any right or privilege not specifically stated therein." 35 Fed. Reg. 6322 (1970) amending 23 C.F.R., Chap. 1, pt. 1, § 132.

It is likely that the Department will take the same view of the policy to record findings under sections 1653(f) and 138.

II. THIS COURT'S DECISION IN *UNITED STATES v. MORGAN*, 313 U.S. 409 (1941), DOES NOT BAR INQUIRY INTO WHETHER AN ADMINISTRATIVE OFFICIAL HAS MADE DECISIONS REQUIRED BY LAW.

The court of appeals held that even though there was no record of any determinations under sections 1653(f) and 138, petitioners were prohibited by *United States v. Morgan*, 313 U.S. 409 (1941), from taking depositions to ascertain whether in fact such determinations had been made and, if so, on what basis. This issue arose because at the time the district court granted summary judgment, petitioners were under a court order not to depose former Federal Highway Administrator Bridwell to ascertain whether he determined that there were no feasible and prudent alternative routes to that through the park. Petitioners noticed the deposition of Bridwell in order to impeach the Swick affidavit filed on behalf of Secretary Volpe. When respondents' motions to dismiss were suddenly converted to motions for summary judgment, petitioners proffered that if they were permitted to depose Mr. Bridwell, he would testify that he did not make the determinations as claimed by Swick. (A. 162) Nevertheless the district court granted summary judgment for respondents and the court of appeals affirmed, relying on *United States v. Morgan, supra*.

The decision below is an unwarranted extension of *Morgan*. In that case the Secretary of Agriculture held a quasi-judicial hearing after which he issued an order establishing a rate schedule. The order was based on elaborate findings. 313 U.S. at 414. At a hearing challenging that order, he appeared as a witness and was questioned about the manner and extent to which he considered the administrative record before making his findings and order. This Court held that it was improper for him to be examined as to the mental processes by which he reached the conclusions in his order. 313 U.S. at 422. In the present case, however, the Secretary of Transportation was not acting in a quasi-judicial capacity as was the Secretary of Agriculture in *Mor-*

gan; nor has he made a written order or written findings as was done in *Morgan*. Petitioners wanted to depose Bridwell in order to make a record that would disclose whether a decision had been made and, if so, the basis for that decision.

Morgan may prohibit examination as to *how* a final decision was reached; but, as a later case established, it does not shield an official from testifying *whether* he made a decision required by law. In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), Accardi charged that the Board of Immigration Appeals, in ordering him deported, had prejudged his case on the basis of a list published by the Attorney General naming him as an unsavory character, who should be deported. This Court held that Accardi was entitled to an evidentiary hearing on the question of whether the Board had exercised its own discretion in ordering him deported, or whether it had acted solely because Accardi appeared on the Attorney General's list. The Court said:

"It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. If such were the case we would be discussing the evidence in the record. . . . Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations." 347 U.S. at 268.

On remand, the district court held a hearing at which all the members of the Board of Immigration Appeals testified as to the influence of the Attorney General's list on their decision. The district court determined that the members had exercised their own discretion; the court of appeals reversed. *United States ex rel. Accardi v. Shaughnessy*, 219 F.2d 77 (2d Cir. 1955). This Court then reversed the court of appeals, holding, over a dissent based on *Morgan*, that the district court had held a proper hearing and had correctly decided that Accardi failed to prove his case. *Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 280 (1955).

A number of other cases make it clear that even where administrative officials have acted in a quasi-judicial manner, *Morgan* does not protect them from interrogation where there is some indication that such discovery would reveal a failure to comply with the law. *Singer Sewing Machine Co. v. NLRB*, 329 F.2d 200, 206-08 (4th Cir. 1964); *United Savings Bank v. Saxon*, 209 F. Supp. 319 (D.D.C. 1962); *Virgo Corp. v. Paiewonsky*, 39 F.R.D. 9 (D.V.I. 1966).

In a recent case, precisely on point, the United States District Court for the District of Columbia, *D.C. Federation of Civic Associations, Inc. v. Volpe*, 316 F. Supp. 754 (D.D.C. 1970),¹⁷ faced with the lack of any written determinations under sections 1653(f) and 138, ordered Secretary Volpe to testify whether he made the required determinations with respect to the Three Sisters Bridge project in Washington, D.C. The court said:

"Since some of these decisions were not committed to writing at the time they were made, it was only by allowing the questioning of the Secretary himself that the Court could ascertain whether the decisions were in fact made and what constituted the basis for the decisions.

* * *

"The interrogation of Secretary Volpe here was limited to the actions which he took, and the materials which he considered as the basis for his determination, rather than his mental process in considering these materials.

"In retrospect, the Court feels that its decision to require the Secretary to testify was a wise one." 316 F. Supp. at 760-61, fn. 12.

¹⁷ Also in at least two other actions against the Secretary of Transportation challenging highway projects, federal officials have appeared as witnesses and testified as to their decisions and the basis for them. *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650, 658 (S.D.N.Y. 1967); *Triangle Improvement Council v. Ritchie*, 314 F. Supp. 20 (D.W.Va. 1969), *aff'd*, 429 F.2d 423 (4th Cir. 1970).

The decision of the district court in *D.C. Federation of Civic Associations, Inc. v. Volpe* was clearly correct, particularly if, as the court of appeals below held, the Secretary is not required to make a record of his determinations under sections 138 and 1653(f).¹⁸ Otherwise the only record on which the court would have to review the Secretary's actions would be affidavits filed on behalf of the Secretary, which petitioners would be barred from attacking through depositions or cross-examination.

In this case there was substantial evidence that Mr. Bridwell would have testified that he did not make the decision required by sections 1653(f) and 138. For instance in his testimony before a congressional committee concerning his activities in the Memphis case, he testified that after outlining several feasible alternatives to the City Council, "we left it completely in the hands of the city council to choose anything they wanted to choose. . . ." (A. 66) The clear implication of this statement is that the City Council, and not the Department of Transportation, made the decision to reject the alternative routes. Secondly, although petitioners had specifically alleged, and supported by affidavit, that no determinations under those statutes had ever been made, Mr. Swick in his affidavit was unable to state positively to the contrary. The most he could say was that Mr. Bridwell and Secretary Boyd had "reaffirmed" a decision made in 1956—some ten years before the applicable statutes had been passed. Third, a Department of Transpor-

¹⁸ At one point in the pretrial proceedings in *D.C. Federation of Civic Associations, Inc. v. Volpe*, the district court, in order to expedite the trial of that case, refused to permit plaintiffs to take the oral deposition of the Secretary of Transportation. A petition for a writ of mandamus was filed. At the argument, counsel for the government agreed to a continuance of the trial in order that discovery could be completed. The court dismissed the petition saying: "We feel that no definitive action by this Court on this petition need be taken." *D.C. Federation of Civic Associations, Inc. v. Sirica*, No. 24216, (D.C. Cir. May 8, 1970). When the case came on for trial in the district court, that court ordered Secretary Volpe to testify.

tation press release cited in Petition for Certiorari at p. 7, *Individual Members of the San Antonio Conservation Society v. Texas Highway Department, et al.*, No. 1101 O.T. 1970, indicates that the first decision under these statutes was made in September, 1968 in the San Antonio controversy. If that is accurate, it means that no such decision was made with respect to Overton Park in April, 1968 when, according to the Secretary, the final decision on the location was made. And finally the startling material uncovered by the plaintiffs in *D.C. Federation of Civic Associations v. Volpe, supra*, including the facts relevant to this case (see fn. 15, *supra*), which is set forth fully in their Brief Amici Curiae in this case, is a further indication of the appropriateness, and indeed the necessity of full discovery in a case such as this.

III. THE COURTS BELOW ERRED IN GRANTING SUMMARY JUDGMENT FOR RESPONDENTS ON THE BASIS OF THE AFFIDAVITS SUBMITTED BECAUSE THOSE AFFIDAVITS WERE NOT THE ADMINISTRATIVE RECORD ON WHICH RESPONDENTS HAD ACTED AND THAT RECORD WAS NOT BEFORE THE COURTS BELOW.

The third question presented is whether it was proper for the courts below to undertake a review of respondents' determinations and to grant summary judgment for them when respondents failed to submit the administrative record on which they acted but instead submitted only affidavits prepared for this litigation. The Solicitor General has now conceded, on behalf of the Secretary of Transportation, that the courts below should not have granted summary judgment for respondents without having the full administrative record before them (Motion to Remand to the District Court, p. 2). Commissioner Speight, however, disagrees with petitioners and respondent Volpe. His position is, we submit, clearly untenable.¹⁹

¹⁹ Respondent Speight has argued (Response to Motion to Remand) that the issue of whether any determinations under sections 1653(f)

Respondents have referred in their briefs and their affidavits to a number of studies which, they assert, have explored all alternative routes and designs in considerable detail and which, they say, fully support the Secretary's determinations. It is curious, however, that neither of respondents filed those documents in the district court. Rather than submitting the studies and analyses so that the court might reach its own conclusion as to whether they support the Secretary's actions, respondents submitted affidavits of various officials who participated in the planning process explaining in conclusory terms that they had made certain studies, and asserting that those studies would support the present route and design.²⁰

A perusal of the affidavits filed by respondents makes it clear that the underlying documents, not filed below, are highly relevant to any review of the Secretary's actions and that self-serving summaries contained in the affidavits are not adequate substitutes.²¹

and 138 were arbitrary and capricious or were not supported by substantial evidence was not raised by the pleadings. While the complaint does not make any explicit allegation to that effect, we believe it fairly presents the issue. In any event, the issue was clearly raised and considered in the district court proceedings and considered by the court of appeals. Rule 15(b), FED. R. CIV. P. provides in part "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Thus the issue is clearly in this case.

²⁰The failure to attach the documents to the affidavits was in direct contravention of Rule 56(e), FED. R. CIV. P., which requires that when affidavits are filed in support of a motion for summary judgment "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

²¹Mr. Luther Keeler, Development Engineer of the Tennessee Highway Department, refers in his affidavit to location studies and reviews "completed between 1957 and 1964"; to the contract "to prepare preliminary and final design plans" for this project; and to additional design reviews and plans prepared by the Bureau of Public Roads. None of those plans or studies was produced. Mr. Rawlings, Regional Right-of-Way Engineer of the Tennessee Department of Highways,

In reviewing an action under the Administrative Procedure Act, 5 U.S.C. § 706, the court is to "review the whole record. . . ." In a case of this nature the "record" includes the record of all actions taken with respect to the project and the information which the Secretary had before him when he made the decisions under review. *Western Addition Community Organization v. Weaver*, 294 F. Supp. 433, 437 (N.D. Calif. 1968); *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650, 662 (S.D.N.Y. 1967). That record is not before this Court and was not before the courts below. The courts below offered no basis for permitting an administrator whose judgments are subject to review under the Administrative Procedure Act to submit in support of a motion for summary judgment not the record on which he acted, but litigation affidavits characterizing those parts of the record which may support his decision.²² Obviously a court cannot properly perform its reviewing functions on such an incomplete record and, as the Solicitor General now concedes, it was error for the courts below to attempt to do so.

refers in his affidavit to studies by the Department of Highways of the use of siphons and pumps in connection with the determination of the design of the highway. Those studies were not produced. In a letter to the president of Citizens to Preserve Overton Park, former Secretary of Transportation Alan Boyd stated that he had "asked Mr. Bridwell to develop a number of specific design alternatives in order to minimize damage to the Park and its facilities." (A. 25). Mr. Bridwell then requested that alternate studies be made of lowered grade lines. (A. 137). The results of the studies are not included in this record.

²² Affidavits such as these, written after the Secretary made the decision under review, are not a part of the "administrative record." *Garvey v. Freeman*, 397 F.2d 600, 610-11 (10th Cir. 1968) and cases cited therein.

IV. THE HOLDING OF THE COURTS BELOW THAT PETITIONERS ARE REQUIRED TO SHOW THAT THE SECRETARY'S DETERMINATIONS UNDER SECTIONS 1653(f) AND 138 ARE ARBITRARY AND CAPRICIOUS IS CONTRARY TO THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT GOVERNING THE SCOPE OF JUDICIAL REVIEW.

The court below held that because petitioners were challenging administrative action, they were not entitled to a *de novo* hearing but, in order to prevail, were required to prove that the Secretary's determinations under sections 1653(f) and 138 were arbitrary and capricious. The court did not elaborate on the meaning of those elusive words in the context of this case, (*cf. Berger, Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55,83 (1965)) nor did it explain how one challenging a decision under sections 1653(f) and 138 could ever meet such a burden where the administrative record was not before the court, where the plaintiffs were not entitled to full discovery, and where there was no record of what decisions were made and the basis for them.

The Secretary's actions are reviewable under the Administrative Procedure Act, 5 U.S.C. (Supp. V) § 706. That statute provides in relevant part:

"The reviewing court shall . . .

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be . . .

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

* * *

"(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

"(F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court."

Judge Celebrezze, in dissent, stated, correctly we submit, that the proper standard of review is whether the Secretary's determinations are supported by substantial evidence. The majority's rejection of Judge Celebrezze's position was undoubtedly based, at least in part, on its belief, now conceded by the Solicitor General to be erroneous, that the court could review the Secretary's actions without having before it the administrative record on which he acted. With no such record in evidence, section 706(2)(E), relied upon by Judge Celebrezze, would obviously be inapplicable. However, it is now conceded that in any further proceedings, that record, including transcripts of hearings required by statute and regulations to be held with respect to the location and design of the highway,²³ should be before the court. Section 706(2)(E) would then be applicable, since it governs where there has been a hearing "provided by statute." That section specifically requires the "substantial evidence" standard.

Furthermore, if a reviewing court has before it the administrative record on which the Secretary acted, there is no justification for affirming his determinations under sections 1653(f) and 138 if they are not supported by substantial evidence. This Court said in *Consolo v. FMC*, 383 U.S. 607 (1966) that the substantial evidence test "gives proper respect to the expertise of the administrative tribunal and it helps promote uniform application of the statute." 383 U.S. at 620 (footnote omitted). Those same considerations should apply here. The courts below suggested no reason for recording the Secretary's determinations under sections 1653(f) and 138 any greater weight than is normally afforded an administrator's judgment.²⁴

²³23 U.S.C. (Supp. V) § 128; 23 C.F.R., Chap. 1, Part I, App. A (1970).

²⁴In a similar case, a court, in reviewing the administrative record, equated the arbitrary and capricious test with the substantial evidence test. See *Western Addition Community Organization v. Weaver*, 294 F. Supp. 433, 441, 443 (N.D. Calif. 1968). There is no indication that the courts below intended to equate the two.

As Judge Celebrezze pointed out below, these statutes do not confer broad discretionary authority on the Secretary, but in fact they narrowly limit the situations in which he may approve highways which affect public parks. The courts should scrutinize his actions carefully to insure that he stays within that narrow course charted by Congress. Such scrutiny will be difficult if the Secretary need only show that his actions were not arbitrary or capricious.

If section 706(2)(E) is not applicable to a review of the Secretary's action, then the proper standard is, we submit, whether the decision is "unwarranted by the facts" which would be found after a "trial de novo." 5 U.S.C. (Supp. V) § 706(2)(F).²⁵ Generally, those attacking an administrative judgment made *ex parte*, who have not had an opportunity to present evidence to the administrator or to challenge opposing evidence are entitled to *de novo* factual determinations, and are entitled to relief if the administrative judgment is "unwarranted by the facts." 706(2)(F). See, e.g., *First Nat'l Bank v. Saxon*, 352 F.2d 267 (4th Cir. 1965); *New Hampshire Fire Ins. Co. v. Murray*, 105 F.2d 212, 217 (7th Cir. 1939); section IV, Brief Amici Curiae of the Committee of 100 of the Federal City in this case. Moreover, the legislative history of the Administrative Procedure Act points out that sections 706(2)(E) and (F) were meant to be correlative; with (E) governing cases where there was an administrative record based on a hearing required by statute and (F) governing all other cases.²⁶ The Senate Judiciary Committee Report states:

²⁵ A decision as to whether review is governed by section 706(2)(E) or (F) could be deferred until after the administrative record has been introduced and the court determines to what extent review could be based on that record or to what extent the lack of any record made a trial of the facts *de novo* necessary. Compare *D.C. Federation of Civic Associations v. Volpe*, *supra*, at 769.

²⁶ The arbitrary and capricious test was included as "the minimum requisite under the Constitution." ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong. 2d Sess. 39 (1944-46).

"The Fifth category [706(2)(E)] necessarily limits the substantial evidence rule to cases in which Congress has required an administrative hearing in which the administrative record may be made. The sixth category [706(2)(F)] expresses the correlative situation in which Congress has not provided by statute for an administrative hearing and consequently any relevant facts must be presented *de novo* to original courts of review. . . ."

ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong. 2d Sess. 39 (1944-46). *See also* pp. 279, 370.

Thus if review is not under 706(2)(E), it must be under 706(2)(F) and in either case the decision below adopting the "arbitrary and capricious" standard is erroneous.

V. THE COURTS BELOW ERRED IN GRANTING SUMMARY JUDGMENT FOR RESPONDENTS BECAUSE THERE ARE NUMEROUS DISPUTED ISSUES OF MATERIAL FACT IN THIS RECORD.

In its order denying the petition for rehearing, the court of appeals held that summary judgment was properly granted because "no competent evidence was presented to the district court or to this Court to impeach the affidavit of Mr. Swick." The court held that the affidavit of Arlo I. Smith, who is Chairman of Citizens to Preserve Overton Park and who has followed the activities of the Department of Transportation in this matter as closely as a private citizen can, was not competent because it was based in part on information and belief and contained some conclusory statements. However, the court did not apply the same scrutiny to the Swick affidavit. For instance, Swick relied at least in part on unauthenticated press releases and letters which are hearsay and incompetent to support a summary judgment. *E.g., Union Insurance Soc. of Canton Ltd. v. William Gluckin & Co.*, 353 F.2d 946 (2d Cir. 1965).

Even if the statements in the Smith affidavit which the court of appeals held incompetent are not considered, there

is in the record much competent evidence which contradicts Swick's affidavit and raises genuine issues of disputed fact. For instance, Swick asserted that the route through Overton Park was approved in 1956. We cited above (p. 6) a letter from former Secretary Boyd indicating that no final decision had been reached as late as 1968. Mr. Swick asserts that former Federal Highway Administrator Bridwell reaffirmed a decision that the present route was the only prudent and feasible route. Contradicting that statement is Mr. Bridwell's testimony before the congressional subcommittee that he had told the Memphis City Council "Yes, there are alternatives" and that:

"We told them that a highway could be built through the area on almost any conceivable line that they could pick, that engineeringly it was feasible."
(A. 65)

In the district court petitioners proffered that Mr. Bridwell would testify on deposition that neither he nor any other federal officials made the finding which Mr. Swick asserts he made.

The implication in Mr. Swick's affidavit that a fully depressed route, either completely or partially covered, would not minimize harm to the park is disputed by the statements of the Department of the Interior officials who recommended such designs to lessen the impact upon the park. (A. 46, 50) Furthermore, the implications in his affidavit that a tunnel would create unacceptable safety hazards is disputed by an affidavit documenting the use of tunnels in the interstate system. (A. 78-79) Mr. Swick states in his affidavit that a fully depressed design is "unreasonable," and apparently, therefore, "impossible," because it would require the use of an inverted siphon or pumps to aid drainage of a small creek under the depressed roadbed. Petitioners submitted affidavits of experts which stated that the hazards involved in using the kinds of siphons and pumps required here can be easily overcome and that these pumping devices are used frequently in the interstate high-

way system. (A. 75-77). These are only a few examples of the disputed facts in this record, but they adequately illustrate the error of the courts below in granting and affirming summary judgment.

CONCLUSION

For the foregoing reasons this Court should hold that the Secretary has failed to comply with sections 1653(f) and 138 and should reverse and remand to the district court for it to remand to the Secretary for further proceedings consistent with the Court's opinion. Alternatively the remand could simply instruct the district court to enter an order enjoining construction of the highway until such time as the Secretary makes the required findings and determinations. If the Court should hold that the Secretary is not required to make a record of his determinations under those sections, it should nevertheless reverse the decision below and remand for a trial in the district court, with appropriate pretrial discovery, at which the administrative record could be introduced, and after which petitioners would be entitled to relief if they could prove that the Secretary's actions were not supported by substantial evidence or were unwarranted by the facts. Furthermore, the Court should continue the stay currently in effect until the completion of any further proceedings below.

Respectfully submitted,

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APPENDIX

**Legislative History of 49 U.S.C. (Supp. III)
§ 1653(f) and 23 U.S.C. (Supp. V) § 138**

The language of section 4(f) of the Department of Transportation Act, 49 U.S.C. (Supp. III) § 1653(f) (hereinafter section 1653(f)) and section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. (Supp. V) § 138 (hereinafter section 138) is sufficiently precise that these sections may be, and petitioners submit should be, applied without any resort to the legislative history. *E.g.*, *Caminette v. United States*, 242 U.S. 470 (1917). However, since these statutes have never been before this Court before, we believe a review of their legislative history is appropriate. This discussion is particularly appropriate here because the courts below (1) selected out of context two passages of the 1968 legislative history which give a misleading impression of the Congressional intent and (2) as we point out below, relied not upon authoritative sources of legislative history but rather on post-enactment efforts to limit the scope of these sections.

The predecessors to these statutes were first enacted in 1966. The Federal-Aid Highway Act of 1966, signed by the President on September 13, 1966, provided in part:

"After July 1, 1968, the Secretary shall not approve under section 105 of this title any program for a project which requires the use for such project of any land from a Federal, State or local government park or historic site unless such program includes all possible planning, including consideration of alternatives to the use of such land, to minimize any harm to such park or site resulting from such use."
23 U.S.C. (Supp. III) § 138; 80 Stat. 771.

This provision, which became section 138 of the Federal-Aid Highway Act, did not become effective until July 1, 1968. Its language varied somewhat from the present language of sections 138 and 1653(f) since, where parks or historic sites were to be used for highways, it required "con-

sideration" of alternatives, but did not explicitly require, as sections 1653(f) and 138 now do, that the Secretary utilize any feasible and prudent alternative.

One month after enactment of the Federal-Aid Highway Act of 1966, Congress passed the Department of Transportation Act. Section 2(b)(2) of the Act stated:

"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites."

Section 4(f) of that Act, 49 U.S.C. (Supp. III) § 1653(f), 80 Stat. 934, contained the requirements now found in sections 1653(f) and 138; that is, it prohibited the Secretary from approving a highway project affecting a public park "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park"¹

Section 4(f) was added to the Department of Transportation Act by the Senate Committee on Government Operations which stated in its Report on that Act:

"This, [section 4(f)] and the policy statement in section 2, are designed *to insure that in planning highways, railroad rights-of-way, airports and other transportation facilities, care will be taken, to the*

¹The section provided in full:

"The Secretary shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge or historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge or historic site resulting from such use."

maximum extent possible, not to interfere with or disturb established recreational facilities and refuges." (Emphasis added.) S. REP. NO. 1659, 89th Cong., 2d Sess. 6 (1966).

Although the House version of the Department of Transportation Act contained no provision similar to section 4(f), the House and Senate conferees retained 4(f) in the Act without substantial change. See STATEMENT ON THE PART OF THE HOUSE MANAGERS ACCOMPANYING CONFERENCE REPORT, H. R. REP. NO. 2236, 89th Cong. 2d Sess. 25 (1966).² The Department of Transportation Act was signed by the President on October 15, 1966 and became effective April 1, 1967.³ The language of section 1653(f), the Senate Report, and later discussion on the floor of the Senate, 112 CONG. REC. 26565 (1966), make it absolutely clear that this provision applied to decisions of the Secretary with respect to

²With respect to section 4(f) the Report of the House Managers states:

"In section 4(f) the Senate amendment contained language requiring the Secretary of Transportation to cooperate and consult with the Secretaries of Interior, Housing and Urban Development, and Agriculture and with the States in developing transportation plans and programs that carry out the policy of preserving the natural beauty of the countryside and public park and recreation land, wildlife and waterfowl refuges, and historic sites. The Secretary was prohibited from approving programs or projects requiring the use of any such land unless there is no feasible alternative and all possible planning to minimize harm is taken.

"The conference substitute amendment adopts the Senate amendment language except for adding the words 'and prudent' after the word 'feasible.' "

³According to section 15(a), the Act was effective "ninety days after the Secretary first takes office, or on such prior date after enactment of this Act as the President shall prescribe and publish in the Federal Register." By Executive Order 11,340, 32 Fed. Reg. 5453 (1967), the President made April 1, 1967 the effective date of the Act.

highways. Thus, as of April 1, 1967 the Secretary of Transportation was required under 49 U.S.C. (Supp. III) § 1653 (f) not to approve any highway projects affecting parks such as Overton Park unless (1) there were no feasible and prudent alternatives and (2) unless the program includes all possible planning to minimize harm to the park.

A year after the Department of Transportation Act became effective, Congress had before it a series of amendments to the Federal-Aid Highway Act, including proposals designed to harmonize the language of sections 138 and 1653(f). The House Committee on Public Works proposed that section 4(f) be amended to conform to the language of section 138. See H. R. No. 17134, 90th Cong., 2d Sess. § 17 (1967). Secretary of Transportation Boyd opposed the proposal to amend section 1653(f). In a letter to Speaker of the House McCormack he said:

"the Department opposes the proposed amendment at this time—little more than a year after the effective date of section 4(f). The department is aware of no problems which have arisen in the course of administering the present language, nor does the Committee Report refer to any. We think the present language of section 4(f) is a clear statement of the Congressional purpose. Accordingly, there would appear to be no reason to amend it at this time." 114 CONG. REC. 19530 (1968).

The Senate Public Works Committee also considered the proposed amendments to the Federal-Aid Highway Act and recommended no amendments to either sections 138 or 1653(f). On the floor of the Senate, however, Senator Jackson called attention to the House proposal to amend section 1653(f) and proposed an amendment that would conform section 138 to the requirements of section 1653(f). The Senate adopted that amendment. 114 CONG. REC. 19531 (1968).

Although the Senate Public Works Committee Report proposed no amendments to sections 1653(f) or 138, it did

set forth its views as to the requirements of section 1653(f), in its then present form, which had then been in effect for over a year:

"The committee is firmly committed to the protection of vital park lands, parks, historic sites, and the like. We would emphasize that everything possible should be done to insure their being kept free of damage or destruction by reason of highway construction." S. REP. NO. 1340, 90th Cong., 2d Sess. 19 (1968).

The Committee Report then went on to say, in a passage relied on by the court below:

"The committee would further emphasize that while the areas sought to be protected by section (4)(f) of the Department of Transportation Act [1653(f)] and section 138 of title 23 are important, there are other high priority items which must also be weighed in the balance. The committee is extremely concerned that the highway program be carried out in such a manner as to reduce in all instances the harsh impact on people which results from the dislocation and displacement by reason of highway construction. Therefore, the use of park lands properly protected and with damage minimized by the most sophisticated construction techniques is to be preferred to the movement of large numbers of people." *Ibid.*

Whether or not that statement is inconsistent with the preceding sentence in the Committee Report, it is plainly inconsistent with the statutory language, since an alternative route which avoids a city park will in almost every instance involve dislocation of more homes and businesses than the route which uses the park. In determining the weight to give this Report, it is important to bear in mind that the Senate Public Works Committee was referring to a statute which was originally proposed by the Senate Committee on Government Operations and had been in effect over a year. Thus the Committee Report was not a statement of intent at the time section 1653(f) was passed, nor can it even be

fairly argued that the Committee was interpreting its own prior action. It was rather a post-enactment effort to put a gloss on an effective act which had originated in another committee and has no persuasive significance here. *United States v. Wise*, 370 U.S. 405, 411 (1962).

In the conference to reconcile the House and Senate amendments to sections 1653(f) and 138, the Senate conferees prevailed. The bill reported by the conference and adopted by both Houses made sections 138 and 1653(f) identical and included in both that language previously contained in section 1653(f), which prevents the Secretary from approving a project affecting a park "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."⁴ See sections 18(a) and (b), Federal-Aid Highway Act of 1968, 82 Stat. 823-24, amending 23 U.S.C. § 138 (Supp. III) and 49 U.S.C. (Supp. III) § 1653(f).

The Conference Report did not discuss these sections. The House Managers, however, appended a statement to the Conference Report. In an apparent effort to regain in

⁴Sections 1653(f) and 138, as amended in 1968 contain three sentences. The first was verbatim repetition of section 2(b)(2) of the Department of Transportation Act, 49 U.S.C. § 1653(f). The second sentence is what had been the first sentence of 4(f). The third sentence while retaining what was in 4(f) after the word "unless" did amend the third sentence by adding the italicized words set forth below:

" . . . the Secretary shall not approve any program or project which requires the use of any *publicly owned* land from a public park, recreation area, or wildlife and waterfowl refuge of *national, State, or local significance as determined by the Federal, State or local officials having jurisdiction thereof*, or any land from an historic site of *national, State, or local significance as so determined by such officials* unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

the legislative history what they had lost in the conference and in the statute itself, the House Managers stated, in a passage relied upon by the courts below:

"This amendment of both relevant sections of law is intended to make it unmistakably clear that *neither* section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands or that clearly enunciated local preferences should be overruled on the basis of this authority."

Statement of House Managers attached to CONF. COMM. REP. NO. 1779, 90th Cong., 2nd Sess. 32 (1968). This statement was neither the statement of the Conference Committee nor the statement of the House, but merely the personal statement of the seven House members who signed it.

When the conference bill came before the Senate, the Senate conferees specifically disclaimed the statement of the House Managers and in particular the passage cited above. They stated that not only was there no such discussion in the conference, but that this statement did not express the intent of the conference committee, did not express the intent of the Senate and was, indeed, contrary to the terms of the statute.

The following colloquy ensued among Senator Randolph (the Chairman of the Public Works Committee and a conferee), Senator Cooper (ranking minority member of the Public Works Committee and a conferee) and Senator Jackson (the originator of the Senate amendment to sections 1653(f) and 138):

"MR. COOPER. . . I invite the attention of the Senator from West Virginia to the interpretation given in the report of the managers on the part of the House. *I believe it is wrong, and is contrary to our discussions in the conference.* But most impor-

tant—and I believe this is an interpretation that will hold—it is contrary to the language of the section. There is nothing concerning discretion of the Secretary in the section itself.

“I read from page 32 of the conference report, in the statement of the managers on the part of the House:

“ ‘This amendment of both relevant sections of law is intended to make it unmistakably clear that neither section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that clearly enunciated local preferences should be overruled on the basic [sic] of this authority.’

“I recall no discussion in the conference of any such intent. Furthermore, the language of the section gives no discretion. If a local official, a State official, or a Federal official having jurisdiction finds one of these areas or sites to be of significance, there is no discretion given to the Secretary of Transportation to permit its use for a highway. Will the Senator agree with me on that?”

“MR. RANDOLPH. I agree with what the distinguished Senator from Kentucky has said in referring to the language of the House Manager’s on page 32 of the conference report. That, I say with due deference to the House, is the interpretation of the House. It is not our interpretation. I agree with the Senator from Kentucky. This is not as we believe it.

“MR. COOPER. The legislative language, if it is clear on its face, of course, must be interpreted that way. The language prohibits any intrusion upon or invasion of these lands or areas if one of these bodies finds it is of National, State, or local significance,

and the highway cannot be built, unless there is no feasible and prudent alternative to doing so.

"MR. RANDOLPH. I agree with the Senator."
114 CONG. REC. 24033 (1968) (Emphasis added).

The colloquy continued:

"MR. JACKSON. My understanding is, in connection with the amendments that have been made to section 4(f) of the Department of Transportation Act, that even though the local authorities—meaning the State or authorities in a subdivision of the State—should decide the highway would not violate the recreational area or the public park area, the Secretary nevertheless would retain the right to veto the action. Would the Senator from West Virginia, who is the chairman of the committee and the floor manager of the bill, respond to that?"

"MR. RANDOLPH. The Senator is correct. That is retained in the Secretary's authority.

"MR. JACKSON. So it is the understanding of the Senate conferees—and I understand it is the position of the ranking minority member of the committee, the able Senator from Kentucky—that that authority is retained under the amended provisions of section 4(f).

"MR. RANDOLPH. Yes; it is retained. The Senator from Kentucky and I agree on that.

"MR. COOPER. This right has not been taken away from the Secretary?"

"MR. RANDOLPH. This has not been removed.

"MR. COOPER. That was my understanding in the discussion that occurred in the conference. The Senator from Montana asked the same question.

"MR. JACKSON. I believe it is important that this be clarified.

"MR. RANDOLPH. That is the legislative intent."

Senator Yarborough also entered the dialogue and discussed the San Antonio dispute.

"MR. YARBOROUGH. . . . It was my pleasure to support actively the concerned efforts of the distinguished Senator from Washington [MR. JACKSON] to put section 4(f) into that 1966 act. Before that, I successfully fought to put similar protective language in the Federal-Aid Highway Act of 1966.

"S. 3418, the Senate version of the Federal-Aid Highway Act of 1968, appropriately maintains the authority of the Secretary of Transportation to protect these irreplaceable lands and sites from the cynical intrusions of the insensitive highway lobby.

* * * * *

"The question has been raised that, if the local authorities said that a site had no historic significance, engineers could ram a highway through regardless of a site's being of historic significance. Is that correct?

"MR. RANDOLPH. No; they could not ram it through, as the Senator has said.

* * * * *

"MR. YARBOROUGH. I want to give an example of what happened in my own State, and this has been a matter of controversy for 5 years. Brackenridge Park is located along the San Antonio River in San Antonio. It was set out by a veteran of the War Between the States, and comprises 323 acres in the city of San Antonio. . . . It was the first great park in Texas. Texas has no State or national park like it.

* * * * *

"Now a superhighway is projected to go through it from the north. This is a natural park along the river, and there is not enough open land left over for another park site. Yet, they want to put the highway right through the middle of the park. It has been fought for years. I have no doubt that the city council, which has jurisdiction over this city park, is going to say the park has no historic significance. But do the Federal officials have

authority to withhold the 90-percent Federal share for the highway?

"I want to know if the Federal authorities have a right to protect this park.

"MR. RANDOLPH. Yes; they could withhold funds.

"MR. YARBOROUGH. . . . If you run a highway through a long, slender park of 323 acres you do not have to pay any tax money for right-of-way. Thus the city council, hard pressed for money, is seeking to run a highway right through the center of one of the best parks in the State.

"MR. RANDOLPH. We are not going to allow that.

"MR. YARBOROUGH. This bill will not permit that?

"MR. RANDOLPH. The Senator is correct." 114 CONG. REC. 24036-37 (1968).

This discussion lays to rest any suggestion that the statement of the House Managers represents the Congressional purpose underlying sections 138 and 1653(f).⁵ Particularly applicable here are the words of a scholarly analysis of precisely this problem—conflicting House and Senate glosses on the actual conference report:

"If the final analysis reveals flat disagreement between the two houses there simply is no solution in legislative history. At any rate choosing evidence from one side only cannot be condoned." Note, *Conference Committee Materials in Interpreting Statutes*, 4 STAN. L. REV. 257, 265 (1952).

⁵This same statement of the House Managers had been held, in view of the above-mentioned comments by the Senate conferees, to be unauthoritative evidence of Congressional intent and to represent only "the personal opinions of those who signed it." *D.C. Federation of Civic Associations, Inc. v. Volpe*, No. 23870, Slip Op. p. 17 n. 38 (D.C. Cir. April 6, 1970).

On the basis of this legislative history, several conclusions are appropriate. First, the statutory requirement that the Secretary not approve the project through Overton Park "unless there are no prudent and feasible alternatives" or unless the project "includes all possible planning to minimize harm" to the park was effective on April 1, 1967. Secondly, the "legislative history" relied on by the courts below was not the legislative history of this requirement, instead isolated selections of 1968 debate over what the statute, then in effect for a year, meant. Surely no post-enactment discussion, particularly by congressmen who opposed the measure or had no role in drafting or proposing it, should prevail over the statutory language. And finally the statutory language is sufficiently clear, as attested by Secretary Boyd's letter and by the statute itself, that no resort to the legislative history is necessary.

October 1, 1934

THE PRESIDENT OF THE UNITED STATES OF AMERICA,
WASHINGTON, DC. AND SENATOR H. CRAWFORD,
MEMPHIS, TENN.

THE VICE PRESIDENT, DEPARTMENT OF THE ARMY,
WASHINGTON, DC. AND CHARLES W. SWANN, CHIEF OF
ENGINEER, DEPARTMENT OF HIGHWAYS, MEMPHIS, TENN.

ON WRIT OF HABEAS CORPUS TO THE UNITED
STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1066

CITIZENS TO PRESERVE OVERTON PARK, INC., WILLIAM
W. DEUPREE, SR. AND SUNSHINE K. SNYDER, PETITIONERS,

v.

JOHN A. VOLPE, SECRETARY, DEPARTMENT OF TRANSPORTATION,
AND CHARLES W. SPEIGHT, COMMISSIONER,
TENNESSEE DEPARTMENT OF HIGHWAYS, RESPONDENTS.

**REPLY BRIEF OF RESPONDENT, CHARLES
W. SPEIGHT, COMMISSIONER, TENNESSEE
DEPARTMENT OF HIGHWAYS**

May It Please The Court:

I STATEMENT OF THE CASE

This case involves the question whether Respondents' motion for summary judgment under rule 56 of the Federal Rules of Civil Procedure was properly granted by the United States District Court for the Western District of Tennessee, which decision was affirmed by the United States Court of Appeals for the Sixth Circuit.

This Court, after granting a stay against Respondents, accepted Petitioners' application for said stay and brief thereon as a petition for certiorari, granted same, and has set this matter for hearing on oral argument on January 11, 1971. In addition to the named parties, the Audubon Society and the Sierra Club joined as plaintiffs below and several interested groups have been permitted to file briefs in this Court as *amicus curiae*, including the city of Memphis, Tennessee, and the Memphis Chamber of Commerce.

Since the granting of the petition for certiorari on December 7, 1970, Respondent Volpe, on December 15, 1970, filed with this Court a motion to remand the cause to the

District Court, which motion has been opposed by this Respondent. As of the time of preparation of this brief, this Court has not acted on this motion. The points raised by the Solicitor General in this motion are taken up in detail in this brief.

This cause originated in the United States District Court for the District of Columbia by the filing by Petitioners of a complaint in December 1969 against Respondent Volpe (hereinafter "Volpe" or the "Secretary"). The action was for a declaratory judgment and injunctive relief sought by certain named individuals and an organization, who alleged violations by Volpe of 23 U.S.C. §128, which are not now an issue,¹ and violations of 23 U.S.C. §138 and 49 U.S.C. §1653(f),² all in connection with Volpe's approval of a Federal-Aid highway project, Interstate Highway Number I-40, through a public city-owned park, in the city of Memphis, Tennessee, known as Overton Park. This will be a limited access, expressway-type highway.

The pertinent portions of the complaint, the only material pleadings under Rule 56 of the Rules of Civil Procedure involved in this case, insofar as they pertain to the issues before this court, are as follows:

"8. On April 19, 1968, the Federal Highway Administrator *preliminarily approved* the proposed location of the Project.

"9. On or about June 4, 1969, the Department of Highways for the State of Tennessee (hereinafter the 'Tennessee Highway Department') requested

¹ This charge dealt with alleged procedural defects in regard to the public informational-type hearings which a state must conduct and certify to the Secretary of Transportation, through which the State considers various social and economic effects when Federal-Aid highway projects are involved. These issues were resolved by both lower courts in favor of the Respondents and have been abandoned by Petitioners in this Court.

² These are the statutes dealing with the approval by the Secretary of Transportation of Federal-Aid highway projects which require the use of park lands and similar sites. The statutes, now worded identically, are quoted in full in other portions of this brief.

that the defendant or his subordinates approve a design of the Project which the Tennessee Highway Department submitted to the United States Bureau of Public Roads. On or about November 5, 1969, Defendant Volpe *approved that design* on the condition that the design be modified in accordance with certain requirements which he stipulated. The Tennessee Highway Department has given notice that the design of the Project will be modified according to Defendant Volpe's stipulation.

"10. On or about November 10, 1969, the City of Memphis transferred to the State of Tennessee property in Overton Park for the right of way for the Project. The Tennessee Highway Department has stated that on or about December 19, 1969, it proposes to take bids for construction of parts of the Project, including a part of the Project which will pass through Overton Park." [Emphasis added]

The complaint went on to state the following:

"20. Construction of the Project will require use of a number of acres of park land and recreation area from Overton Park. Overton Park is a park and recreation area of state and local significance. Overton Park has been determined by the state and local officials having jurisdiction thereof to be of state and local significance.

"21. Neither Defendant Volpe nor any previous Secretary of Transportation has made *any finding* that there is no feasible and prudent alternative to the use of such public park and recreation areas. Defendant Volpe has made *no finding* that the program for the Project includes all possible planning to minimize the harm to such park and recreation areas. In the absence of such findings, *his approval of the Project* has violated 23 U.S.C. §138 and 49 U.S.C. §1653(f).

"22. There are feasible alternatives to the use of such park and recreation areas. One or more of the

feasible alternatives are prudent alternatives. The Project does not include all possible planning to minimize harm to such park and recreation areas.

"23. Defendant Volpe plans to treat *his approval of the Project* as a contractual obligation of the Federal Government and to make expenditures to the State of Tennessee pursuant thereto. Because that approval, having been given in violation of 23 U.S.C. §§128, 138, and 49 U.S.C. §1653 (f), is null and void and without legal effect, such expenditures will violate 23 U.S.C. §102." [Emphasis added]³

Thereafter, the cause was transferred by the United States District Court for the District of Columbia to the District Court for the Western District of Tennessee on the application of Respondent Volpe. The only significant action taken prior to this was a protective order denying Petitioners the right to take the deposition of one Lowell K. Bridwell during the pendency of Respondent Volpe's motion to dismiss. At the same time the cause was transferred to Tennessee, this Respondent was made a party by the Court,⁴ apparently under Rule 19 of the Federal Rules of Civil Procedure. This Respondent did not claim sovereign

³ It is important that the Court note at this point that the only claim made was that Volpe has made "no finding," not that he made a finding that was arbitrary, capricious or an abuse of discretion. Further, there is no claim that any finding was made that was not supported by substantial evidence.

⁴ Petitioners also filed an amended complaint making this Respondent a party. The amended complaint contained no changes in the material allegations previously quoted. The original complaint and the amended complaint raised various constitutional issues which have subsequently been waived by Petitioners [see App., p. 163].

immunity under the Eleventh Amendment to the Constitution of the United States.⁵

A large number of affidavits, some with various attachments, plans, photographs and drawings, were filed by all parties both in the District of Columbia and in Tennessee, to which no objections as to competency were raised. Respondent Volpe then moved the Trial Court to treat his motion to dismiss as one for summary judgment, which motion for summary judgment was joined in by this Respondent. After lengthy arguments of counsel, the District Court took the matter under advisement and subsequently rendered a written opinion reported in 309 F.Supp. 1189, which granted said motions for summary judgment. The district Court also refused to grant a stay to Petitioners pending their appeal to the United States Court of Appeals for the Sixth Circuit, although the Court of Appeals did, upon Petitioners' application, grant such a stay pending the disposition of that appeal.

The Court of Appeals, in an as yet unreported opinion,⁶ handed down September 29, 1970, affirmed the Trial Court, so that this case is now before this Court on a petition for certiorari, as before explained.

II. THE ISSUES BEFORE THIS COURT

As previously stated, the main issue is the correctness of the Trial Court's granting of Respondents' motions for summary judgment; however, for proper consideration and determination by this Court, this issue must be subdivided into its basic parts.

⁵ Respondent raised no issue of sovereign immunity, but has always contended that the Federal Courts have no authority to enjoin the State from building the highway. With that reservation, the state of Tennessee chose to participate in the case because Respondent has felt since the inception of this controversy (some 15 years) that it had a valuable interest to protect and a duty toward its citizens to provide this much-needed means of rapid transportation to the city of Memphis, the largest metropolitan area in the state.

⁶ The full text of this opinion, as well as the dissent of Judge Celebrezze, was supplied to this Court by Petitioners with their original application for a stay.

The Petitioners in their brief filed in support of their original application for a stay⁷ listed five basic questions upon which their petition for certiorari is now based. These were stated as follows:

“(a) Whether the Secretary of Transportation sufficiently complied with 49 U.S.C. §1653(f) and 23 U.S.C. §138 in approving this highway without making any record of a determination that there are no feasible and prudent alternatives to the use of a public park and that the design includes all possible planning to minimize harm to the park?

“(b) Where the Secretary has not made a record of any determination under sections 1653(f) and 138, whether his Court’s decision in *United States v. Morgan*, 313 U.S. 419 (1941), prohibits interrogation of a former Federal Highway Administrator to ascertain what determinations, if any, were made under those sections and the basis for any determinations?

“(c) Whether the courts below could properly review the Secretary’s approval of this highway without reference to the full administrative record on which the Secretary acted, but rather on the basis of affidavits prepared for this litigation?

“(d) Whether the courts below were correct in holding that the petitioners were required to show that the Secretary’s approval of this highway was arbitrary and capricious in order to obtain relief?

“(e) Whether the record contains disputed issues

⁷ Because of time factors involved, and the distance between counsel, Respondent had a draft of Petitioners’ brief only a short period prior to the printing of this brief. Therefore, the format of this brief necessarily follows Petitioners’ Application for a Stay (treated by this Court as a Petition for Certiorari) and Brief in support of same. Counsel for Petitioners very cooperatively advised counsel for Respondent of the contents of Petitioners’ brief, and the cursory reading of Petitioners’ brief allowed before printing deadlines showed this advice accurate and helpful.

of material fact, relevant to a review of the Secretary's actions, which make district court's grant of summary judgment for respondents erroneous?"

A sixth issue, not specifically stated by Petitioners, is a determining precedent to the issues Petitioners have raised, particularly the first four issues stated above. This sixth issue is:

Does the Administrative Procedure Act, particularly the sections providing for Judicial Review [5 U.S.C. §§701-706] apply to the approval of the Secretary of Transportation of a highway project under 23 U.S.C. §138 and 49 U.S.C. §1653(f)?⁸

These six issues are subdivided further as the discussion in the following argument requires.

III. STATEMENT OF FACTS

Although the facts alone are not controlling in this case, Respondent feels that this Court should have a clear idea of what Overton Park is, what it contains, and its location in order to understand more fully the position of both Respondents and their predecessors in selecting this route and design. Since this Respondent will be unable to review Petitioners' statement of facts presented to the Court prior to the completion of this brief, he can only rely upon previous written and oral statements made by Petitioners to the two lower courts and to this Court. Petitioners have in the past attempted to influence the true meaning of the facts by the use of adjectives and opinions drawn from their deep emotional involvement in conservation. Such statements as "massive project" and "biological barrier," made by Petitioners in their previous briefs, are examples in point. In

⁸ Both lower courts, as well as Petitioners, have assumed its application, and arguments have centered around the standard of judicial review required. Respondent respectfully suggests that this Court at the time of the oral arguments presented on the application for a stay on December 7, 1970, appeared to be making this same assumption. Respondent respectfully submits that a detailed examination of this Act, as will be hereinafter set out, will establish that this Act has nothing whatsoever to do with this case.

addition, Petitioners tend to exaggerate beyond the realm of reason, or tell only a part of the story, so that persons unfamiliar with the Park or the plans for the road would think this highway plan completely ignored the interests of conservation. To the contrary, these plans are fully accountable to our national conservation policies, balancing these, as they must be, with other, but equally important, national policies regarding transportation and safety.

In addition, Petitioners have in the past attempted to make it appear that they represent a great number of people, and that the entire citizenry is up in arms against Respondents, while, in actual fact, every elected official, including the Mayor and the thirteen members of the City Council,⁹ have gone on public record as favoring the completion of Interstate Highway I-40 through the Park under its present design, which they realize does minimum harm to the Park [see affidavit of Henry Loeb, Mayor, City of Memphis, App., p. 126; Resolution of City Council, App., p. 26; Resolution of Memphis Park Commission, App., p. 119; Affidavit of Hal S. Lewis, Executive Director, Memphis Park Commission, App., p. 112]. In addition, many citizens groups, such as the Memphis Chamber of Commerce, representing a large number of local residents, have evidenced their support of the present route to the extent of filing *amicus curiae* briefs in this Court.

The highway project in question is a segment of Interstate Highway Number I-40, part of the National System of Interstate and Defense Highways [see 23 U.S.C. §103(d)]. The particular project encompasses slightly more of that highway than will be in the Park. The highway will be the major east-west expressway through Memphis; those parts to the east and west of the Park are included in other projects which are in the construction stage at the present time [see affidavit of Virgil A Rawlings, Regional

⁹ Of the 13 Councilmen, six are elected at large from the City and seven are elected from districts, one of which, of course, includes the Park.

Right-of-Way Engineer, Tennessee Department of Highways, App., p. 128].

Overton Park, (herein sometimes called the "Park"), is an almost rectangular block of land containing approximately 342 acres, located near the center of the city. The zoo in the Park is now separated from the rest of the Park by a fence and bus road [see below], and is entirely outside the Highway right-of-way which was acquired. The zoo has always been separated from the Park, and the public has been allowed to enter only at designated entrances. Only one zoo entrance has ever been provided on the side where I-40 will be. The highway plans call for an attractive pedestrian overpass at that entrance so that visitors to the Park can still visit the zoo in the same manner as before. The zoo has always occupied the northern portion of the total land area. Its natural expansion area was, and still is, to the east, which will not be affected by the road [see affidavit of Hal S. Lewis, App., p. 112; affidavit of Thomas E. Maxson, City Engineer, City of Memphis, App., p. 122; see also Resolution of Memphis Park Commission, App., p. 119].

The rest of the Park, south of the zoo, contains a nine-hole golf course, a large outdoor theatre, an art academy, formal garden, bridle paths, nature trails, playgrounds, picnic areas, and a small lake. The highway will be far from the golf course, the outdoor theatre, the art academy or the formal garden. After construction, there will still be over 320 acres with bridle paths, nature trails, playgrounds, and the like. The lake will remain intact, and although close to the road, it will still keep its attractive setting and will continue to be used and enjoyed in the same manner as before [see affidavits previously referred to]. As an undisputed fact, not a single one of these facilities will be affected

substantially, nor will the public be affected in the slightest in its use and enjoyment of these facilities.¹⁰

As shown in the aforementioned affidavits, the highway right-of-way follows a presently-existing, nonaccess, diesel bus route, 40 to 50 feet wide, which has bisected the Park for many years, in exactly the same place and in a similar manner as will the new highway. The only difference is that the new highway right-of-way will, of course, be wider;¹¹ but a large portion of the highway will be depressed below normal grade, whereas the bus route now follows grade level and is, therefore, seen more easily.¹² A large portion of the 26 acres in the right-of-way is already paved with concrete (about 25 feet wide) for this bus route, which follows the zoo fence previously mentioned. Petitioners complain about the "noise and air pollution that accompany major highways" [Petitioners' Court of Appeals brief, p. 3], when, in fact, any noise or pollution produced by these buses is closer to the zoo than the highway will be [see affidavit of Virgil A. Rawlings, App., p. 128]. In addition to the bus route, the Park is bordered on three sides by three of the largest and most heavily-traveled thoroughfares in Mem-

¹⁰ It could be successfully argued that the completion of I-40 with its interchange near the eastern edge of the zoo will make the Park and zoo considerably more accessible to thousands of people who live in outlying suburban areas.

¹¹ The right-of-way through the Park is basically 250 feet wide, but gradually expands to 450 feet at the eastern edge of the Park because of the interchange previously mentioned. The only facility in this part of the Park is a wooden, open air pavilion, used in conjunction with the picnic grounds. The road will not require its removal, but the state of Tennessee has supplied the City of Memphis Park Commission with the necessary funds to remove it and build another farther south [see attachment to affidavit of Virgil Rawlings, App., p. 128].

¹² This bus route is not separated from the Park or the playground areas by any safety barrier and can be crossed by pedestrians at any point. In contrast, the design of I-40, in accordance with usual practice, calls for a fence to keep persons from walking across traffic. In order to go from the zoo to the Park or vice versa a visitor will not have to cross on the same level with vehicles and will face no traffic danger.

phis. Placement of the highway through the Park was planned, in part, to alleviate traffic, noise, and pollution problems created by these City thoroughfares, being one of the reasons there are no other feasible and prudent routes [see affidavit of William S. Pollard, Jr., partner, Harland Bartholomew and Associates, App., p. 101].

The last-mentioned affidavit by the head of the firm which planned the highway route points out that two of these major streets, which are the northern and southern boundaries of the Park, will serve as service roads and permit easy access to and from I-40. If either of the alternate routes suggested to the Court during the previous oral argument (loops to the north and south) had been approved, it would, in addition to the problems mentioned by Mr. Swick in his affidavit (discussed in detail hereinafter), destroy the basic purposes of the highway, since there would be no major street to feed or carry off traffic. Under the present route selection, I-40 runs practically parallel with these two major streets from one end of town to the other. The Pollard affidavit also shows that in the original planning for the Memphis urban expressway system, the location of I-40 along its present route was a major consideration, so that to change the route now would materially affect the balance of the entire system. This includes its circumferential route and its north-south facility, all of which was planned before the statutes in controversy were enacted and construction of most of which is now completed.

Petitioners do not contest that such an east-west expressway is an absolute necessity in Memphis¹³ [see affi-

¹³ It has already been pointed out to the Court that Memphis, with a population of some 700,000 persons, is unique as large cities are concerned. Its western boundary is the Mississippi River and, through the years, it has grown mainly to the east because of low lands to the north, and the state line with the state of Mississippi on the south. The majority of its commercial and industrial development is in the west, while a majority of its residents live in the east. I-40 through Overton Park will be the only direct means for a resident in the east

davit of Henry Loeb, Mayor, App., p. 126, and affidavit of William S. Pollard, Jr., App., p. 101]. On the contrary, it is an undisputed fact that not only is such a route a vital necessity, but also that its delay has already caused great harm to the general public in this area.

The record is undisputed that, of the approximately 170 acres of wooded area in the Park, only about 10 to 15 wooded acres are in the proposed right-of-way.¹⁴ As stated, the bus route presently uses a large portion of the right-of-way, and there are two small gravel parking lots which will have to be relocated. This parking is the only improvement in the right-of-way that will be taken. The Park Commission has made arrangements already to more than offset this rather small parking loss with funds already provided by the State, as explained hereinafter. As shown in the affidavit of Mr. Rawlings, only 23.2 of the 26 acres in the right-of-way are actually for road use, the balance being for easements and the pedestrian overpass at the zoo entrance.

The determination that Interstate Route I-40 should pass through Overton Park was originally made by the Bureau

to reach the western downtown area and the new bridge now under construction across the Mississippi River, a distance of approximately twelve miles over congested city streets already taxed to their limit. The record is clear that the need for the road actually arose more than ten years ago, so that today, this need has now evolved into an urgent, absolute necessity.

¹⁴ Petitioners constantly quote from a statement attributed to someone from the Department of the Interior that, after the taking, "there won't be much in the way of a wooded area left." Petitioners made this statement to the Court on December 7, 1970, during oral argument. This statement could not have been made by anyone who had seen the Park or the plans. Simple arithmetic tells us that this statement is not only untrue, but also grossly irresponsible. There are, as stated, 170 acres of woodland in the 342-acre Park. The entire taking, including easements, is only 26 acres out of the whole. Of these 26 acres, only slightly more than half contain any trees. The rest is either grassy shoulders to the bus route, concrete, or gravel parking lots. With at least 155 acres of trees left, the Interior Department statement cannot be accurate.

of Public Roads¹⁵ in 1956 — more than eleven years before the enactment of 23 U.S.C. §138; the decision was reaffirmed in 1966, 1968, and 1969 [see affidavit of Edgar H. Swick, Deputy Director of the Bureau of Public Roads, App., pp. 27, 28]. Swick attested [Swick Aff., App., p. 27] that “[a]ll alternate alignments were rejected because of large displacements of persons, hospitals, schools, churches, and commercial establishments.” As he further explained [Swick Aff., App., p. 27]:

“For instance, the route immediately north of the park would have involved the taking of three schools, including Southwestern University and the largest high school in Memphis, plus churches attended by 4,000 people, industries, and the residences of more than 1,500 people. The route south of the park would have involved taking two schools, three churches attended by 7,500 people, 46 commercial establishments, residential units being occupied by over 3,000 persons, and a hospital and home for the aged. Incidentally, the construction and right-of-way costs of the least expensive of these alternate routes would exceed the cost of the chosen route by many millions of dollars.”

In 1967, prior to the effective date of the original version of 23 U.S.C. §138, the Secretary authorized acquisition of the right-of-way on either side of the Park, and most of that land has now been purchased and cleared.

Interstate Highway I-40, as Mr. Rawlings pointed out, is part of the total east-west expressway system for the City. Memphis, at present, has no highway of this type, leading from the business or downtown section of the City, located on the City's western edge at the Mississippi River, to its most dense residential areas on the eastern edge of town.

¹⁵ At this time the Bureau of Public Roads was a part of the Department of Commerce. The Department of Transportation Act [49 U.S.C. §1651 *et seq.*], which became effective on April 1, 1967, transferred the Bureau of Public Roads to the new Department of Transportation [49 U.S.C. §1655].

This road will be approximately twelve miles long and will connect on the west with a new Mississippi River bridge now under construction. The route is practically a straight line except for a slight bend at the Park, designed to follow and take advantage of the bus route and avoid the zoo and, hence, minimize harm to the Park. In this route were 1,687 separate parcels of land, including the Park, which is counted as one parcel. All but two have been acquired, and over 1,400 residences, stores and industrial buildings have been removed or are in the process of removal. All but a handful of the people who occupied these lands and buildings have been relocated, and large portions of the highway are under construction [see Rawlings affidavit, App., p. 128; see also 16 aerial photographs taken of the route itself verified by affidavit of Don Newman, App., p. 157].

Petitioners, in their statement of facts, claim that the present route will displace more people than one suggested alternate and nearly as many as the other. Even if this had been true before Interstate 40 were begun, this claim ignores the fact that, when the Secretary approved the route under the Parklands Statute, most of the people on the present route had already been displaced.

For the part of the route through the Park, the state of Tennessee engaged in long and tedious negotiations with the city of Memphis to acquire the actual land needed. These negotiations terminated in a payment by the State to the City of \$2,000,000 for the 26 acres and \$206,000 to the Memphis Park Commission to enable it to build additional parking, move a wooden picnic pavilion so that it will not be too close to the highway and to relocate certain utilities that may be affected. The City deeded the property to the State sometime prior to the inception of this case in Washington, D.C.¹⁶

The affidavits already referred to, plus others in the rec-

¹⁶ The city of Memphis is required by law to replace any parklands so taken with additional parks. The ordinance in question is as follows:

"ORDINANCE NO. 408

"Section 1. ". . . In the event any lands under the control and

ord, made by responsible persons not parties litigant or retained in connection with this litigation, clearly show that the planning and design of this route has been a long and careful undertaking [see affidavit of D. W. Moulton, former Commissioner of the Tennessee Department of Highways, App., p. 141; affidavit of Luther W. Keeler, Engineer with the Tennessee Highway Department, App., p. 133]. This entire highway project, including the segment through the Park, evolved only after long and careful planning, with complete cooperation between all governments involved and their various representatives, both elected and appointed. The affidavits and other proof submitted in support of Respondents' motion for summary judgment clearly show that every conceivable manner and means of finding suitable alternates and of minimizing harm to the Park have been explored in good faith, and that many new thoughts were

jurisdiction of the Memphis Park Commission are sold, taken through proceedings in eminent domain, transferred to another department of the city, or otherwise diverted from use as park lands, the Memphis Park Commission shall be paid the fair market value of the lands involved, together with such incidental damages as are allowed by law and such funds shall be used by the Memphis Park Commission for the purchase of additional park lands and for no other purpose."

As an actual fact, the city of Memphis, in complying with this ordinance, has already used \$1,000,000 of the funds paid to it by the state of Tennessee to purchase a 160-acre park containing a golf course, and anticipates that it can acquire that much more park land with the remaining \$1,000,000. The city of Memphis now operates more than 4,700 acres of parks [see affidavit of Hal S. Lewis, App. p. 112]. One of the gravest problems Respondents face, should the present route be changed, is the disposition of the 26 acres of Overton Park already acquired by the State.

Petitioners contend the route through the Park was chosen because it is cheaper. While there is no proof in the Record of the total costs of alternate routes (including the right-of-way already acquired outside the Park), this Court cannot find that \$2,206,000 is "cheap" for 26 acres of right-of-way, especially in view of high construction costs to minimize harm to the Park [see Michael affidavit, attached to Respondent's reply to Petitioners' Application for a Stay].

adopted from time to time, necessitating changes in design which, although they delayed the project, were thought to be beneficial to the Park.

The route chosen was designed to minimize damage to the Park [see Swick affidavit, App., pp. 28-30]. Thus, the highway is to follow the path of an existing bus road, presently 40 to 50 feet wide, widening it to from 250 to 450 feet, including a 40-foot-wide, landscaped median strip. The approved plan calls for the new roadway to be depressed below ground level so that traffic on the highway will not be visible to users of the Park; in only one area, where the highway crosses a creek, it will not be depressed, since to do so would cause serious drainage problems.

On November 5, 1969, the Secretary again approved the plans for the Overton Park highway. A proposal that the interstate road be tunneled by boring under the Park was then found unacceptable because the cost would have been about \$107,000,000, as compared to \$3,500,000 for the depressed route;¹⁷ moreover, it presented difficulties of construction, drainage, concentrated air pollution at ventilation points, and traffic safety. Another proposal that the highway be built in a cut and covered at ground level was unsatisfactory for similar reasons; it would have cost approximately \$41,500,000, and would not have preserved the original park vegetation [see Swick affidavit, App., p. 28]. In issuing his approval of the route, the Secretary required certain design changes intended to minimize dam-

¹⁷ All of these cost figures were based upon estimates made by both the State and Federal governments. The actual bid received on the proposed design was \$5,366,000 [see this Respondent's reply to Petitioners' Application for a Stay] or some fifty percent more than the original estimates. This was undoubtedly due to rising construction costs. Consequently, it is reasonable to assume that the estimates for the two types of tunnels should be revised proportionately—over \$160,000,000 for a bored tunnel and over \$60,000,000 for a cut-and-cover type tunnel. Though cost is by no means a controlling factor, this Respondent does feel, as stated by the Court of Appeals, that it is a legitimate consideration.

ge to the Park; these changes were accepted by the state of Tennessee.

There are no affidavits or other evidence supplied by Petitioners which in any way *dispute* the facts that have just been stated. The affidavits and other evidence of Petitioners can be basically characterized in one of three ways:

1. Opinions by experts and others that alternate routes do exist, although they do not state or claim that Respondent Volpe or others have not properly considered them. The affidavit most relied upon by Petitioners in this regard is that of Robert Conradt [App., p. 92], a "professional consultant in transportation planning," who came to Memphis for this litigation. This affidavit will be discussed in the argument on Issue Number Five.

2. Opinions by experts that various construction proposals are "possible" or "feasible" from an engineering point of view, without consideration of any other important factors, such as disruption of the community, social factors, safety factors, environmental factors, costs, or time factors. These will also be discussed in the argument.

3. Statements that because Respondent Volpe or his Department has approved tunnels in other situations, it is mandatory that he do so in this case.

Petitioners' affidavits and complaint assert no facts which put into dispute the established facts as to the manner in which the Secretary approved the route and design of the highway through Overton Park. No fact is alleged by Petitioners which suggests that the Secretary failed to consider any relevant plan, proposal, opinion, fact or theory in approving the route. The facts surrounding the manner of making the choice are not disputed. As correctly stated by the Court of Appeals, "the only issue [raised by these affidavits] is the wisdom of the choice" [Opinion, p. 10].

IV. THE STATUTES INVOLVED

The two major statutes involved in this case (49 U.S.C. §1653(f) and 23 U.S.C. §138) are quoted in full below, along with their original versions, dates of enactment, and effective dates. All relevant legislative history is indicated.

The first expression of a national policy in regard to parklands made by Congress insofar as this case is concerned was in Section 4(f) of the Department of Transportation Act,¹⁸ passed October 15, 1966, and which became effective by executive order on April 1, 1967 [see Executive Order No. 11340, 32 F.R. 5453 (May 30, 1967)]. This section, quoted below, was the predecessor to the present 49 U.S.C. §1653(f):

“(f) The Secretary shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge, or historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.”

This section quoted above, as well as the original version of 23 U.S.C. §138 (which appears in full below) were amended on August 23, 1968, and both new provisions took effect on that day:

“(f) It is hereby declared to be the national policy that special effort should be made to preserve the

¹⁸ See footnote 14. The Department of Transportation Act, §12 [Pub. L. 89-670, §12, 80 Stat. 931 *et seq.*], provided that all orders, determinations, contracts, and the like issued or effective before the effective date of the Act “shall continue in effect according to their terms” until modified or terminated. Thus, the route having been properly approved prior to the effective date of the Department of Transportation Act, the Secretary and his predecessors could have relied on this saving provision to protect their prior approval of the route.

natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

The original version of what is now 23 U.S.C. §138 contained in the Federal-Aid Highways Act was passed on September 13, 1966, but did not take effect, insofar as the Secretary's duties were concerned, until July 1, 1968, by its own terms. This original section is as follows:

"§138. Preservation of parklands

"It is hereby declared to be the national policy that in carrying out the provisions of this title, the Secretary shall use maximum effort to preserve Federal, State, and local government parklands and historic sites and the beauty and historic value of such lands and sites. The Secretary shall cooperate with the States in developing highway plans and programs which carry out such policy. After July 1, 1968, the Secretary shall not approve under section 105 of

this title any program for a project which requires the use for such project of any land from a Federal, State, or local government park or historic site unless such program includes all possible planning, including consideration of alternatives to the use of such land, to minimize any harm to such park or site resulting from such use."

As stated above, this statute reached its present form by amendment, effective August 23, 1968, so that this statute and 49 U.S.C. §1653(f) now read identically (both sometimes hereinafter called the "Parklands Statute"):

§138. Preservation of Parklands

"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreational area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

The amendments were for the obvious purpose of making it

clear that the statutes do not constitute a mandatory prohibition against using the enumerated lands, but rather a discretionary authority vested in the Secretary.¹⁹

The legislative history points out that although Congress wants to protect the enumerated lands, it considers its use highly preferable to displacing large numbers of people.²⁰

Conference Report No. 1799, which contains the Statement of the Managers on the Part of the House [1968 *U.S. Code Cong. & Adm. News*, p. 3538], reads in part as follows:

"This amendment of both relevant sections of law is intended to make it unmistakably clear that *neither* section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that clearly enunciated local preferences should be overruled on the basis of this authority."

[Emphasis in original]

There can be no question whatsoever that Congress specifically intended that this was merely a discretionary enactment with the discretion vested solely in the Secretary of Transportation.²¹

¹⁹ The language of the Parklands Statute itself indicates that Congress intended that the Secretary have wide discretion. A judgment as to whether an alternative route is "feasible and prudent" must be one involving great discretion. Similarly, it is a discretionary determination to decide what planning is "possible" to minimize damage to parkland.

²⁰ 1968 *U.S. Code Cong. & Adm. News*, at 3500.

²¹ Petitioners have contended below that certain debates in the Senate counter the conclusions of the Conference Report quoted in the text. Particularly, Petitioners contend that the remarks of Senator Cooper, during his discussion with Senator Randolph [reported in 114 Cong. Rec. 24032,3 (1968)], show that the Parklands Statute was not intended to vest discretionary authority in the Secretary. However, a careful reading of this discussion shows the contrary to be true. As shown by his remarks in 114 Cong. Rec. 24036 (1968), Senator

An examination of these statutes in context is helpful to the brief which follows. The Department of Transportation Act [Pub.L.89-670, as amended] includes the Parklands Statute as §1653(f) as codified. This Act does not prescribe any procedure under the Parklands Statute, but transfers to the Secretary the duties formerly in the Department of Commerce under Title 23 of the United States Code, including the Federal-Aid Highway Act of 1966 [49 U.S.C. 1655(a)]. Section 1653, containing the Parklands Statute as a statement of policies, also includes other such statements, in articulating the responsibilities of the Secretary. Thus, the Secretary is charged not only with the responsibility of protecting park land, but also with the responsibility of providing safe and efficient transportation, pollution and noise control, and a host of other responsibilities [see 49 U.S.C. §1653(a)]. One must then look to the

Cooper was concerned that the bill, as reported out of conference (and described in the Conference Report quoted) granted the Secretary too much discretion to approve highways through parks. In the discussion with Senator Randolph which Petitioners cite, Senator Cooper responded to a question as to whether the Secretary, under the conference bill, had discretion to *not approve* a project through a park found *not* to be of state or local significance by local officials (the act appearing on its face to apply only to parks so found to be of state or local significance), and Senator Cooper replied that the Secretary did have this discretion (apparently because the Act also allowed Federal officials to make the necessary determination of significance). This discussion has no relevance here, except to show that even Senator Cooper thought that the statute which was passed gave the Secretary wide discretion. There is no issue here that Overton Park is not of local significance; this is admitted. The issue is, having determined this significance, does the Secretary have discretion to approve the project. Such discretion is clearly shown in the legislative history. This is fortified by the fact that Senator Cooper, who thought the Act gave the Secretary more discretion to approve projects than he would have done, voted against the act [114 Cong. Rec. 24038 (1968)]. To interpret the Parklands Statute as Senator Cooper would have liked, but obviously deemed improper (judging from his vote), would erase all meaning from the last clause of the Statute beginning "unless."

Federal-Aid Highway Act for procedural and other policy guidance.

In general scheme, the Federal-Aid Highway Act provides the procedures by which the states are to construct highways under various programs of Federal financial assistance, including the National System of Interstate and Defense Highways [23 U.S.C. §103(d)]. The state highway department submits a program of highway construction to the Secretary, for his approval [23 U.S.C. §105]. After program approval is obtained, the state highway department then submits plans for specific highway projects for Secretarial approval; if the Secretary approves a project, this constitutes a contractual obligation of the United States to provide the financial assistance involved [23 U.S.C. §106(a)]. This latter section provides that, in making his approval, "the Secretary shall be *guided*" (emphasis supplied) by certain standards contained in 23 U.S.C. §109. By this language, these standards are intended as guides or policy statements for the Secretary to look to, not as limitations on his sound discretion in granting or withholding approval. These standards contained in 23 U.S.C. §109 relate to highway safety, regulatory and warning signs, uniformity of design in the Interstate System, maintenance, and the like. Other sections of the Act refer to the manner of payment of the Federal share of highway costs, control of billboards, state public hearings, safety, and the like. While §106, governing the approval of a project, does not refer the Secretary to the Parklands Statute (§138) for guidance, as it does to §109, the Parklands Statute itself is framed in terms of the Secretary's approval of the program or project. The Parklands Statute does not say "No highway shall be built through a Park unless. . . ." It says that "the Secretary shall not approve any program or project. . . ." Therefore, speaking in terms of "approval" as it does, it would appear that Congress intended the Parklands Statute to be a guide to approval under §106 as it intended for the standards in §109.

In the acts of Congress containing the Parklands Statute

now codified as 23 U.S.C. §138 [Pub.L. 89-574, Sept. 13, 1966; Pub.L. 90-495, Aug. 23, 1968], Congress also gave the Secretary certain other policy declarations as guides, now found in 23 U.S.C. §101(b). In these Acts, Congress found that many present highways are inadequate to meet transportation and defense needs, and therefore stated:

"It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways . . . is essential to the national interest and is one of the most important objectives of this Act." [23 U.S.C. §101(b)]

Thus, we see that Congress presented to the Secretary many declarations of national policy, including that of the preservation of parklands, as guides to his discretionary authority in approving highway projects. Under these Congressional pronouncements, it is for the Secretary, in each instance, to weigh these policies and apply them to the facts and circumstances of each project presented for his approval. The Secretary cannot be guided by the Parklands Statute alone, but must give consideration to each statement of policy which Congress handed down for his guidance. In a like vein, this Court must read these sections of the Act together and construe them in *pari materia* in seeking meaning from the Parklands Statute. As this Court recently stated in *Richards v. United States*, 369 U.S.1 (1962), at page 11:

"We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy'."

[See also *Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*, 377 U.S. 235 (1964).]

V. SUMMARY OF ARGUMENT

In the lower courts, Petitioners raised certain issues regarding claimed errors on the part of Respondent Speight

in the process of approving the highway project. These issues have not been raised in this Court, so that, strictly speaking, there are no remaining issues in this case relating directly to the state of Tennessee. This places Respondent, in this brief, in the unusual position of arguing points on behalf of the Secretary. Respondent feels, however, that this is not only proper, but helpful to the Court since, in economic reality, the rights of the state of Tennessee are dependent on the rights of the Secretary in this matter. Respondent further feels that such argument is necessary because the Solicitor General has taken a position on certain points contrary to that of the state of Tennessee.

Respondent contends that neither the Department of Transportation Act nor the Federal-Aid Highway Act, both of which include the Parklands Statute among their provisions, contains any requirement that the Secretary issue written findings or record the reasons for his approval of this highway project. All that is required is that the Secretary, in fact, approve the project, which is an action placed by Congress within the Secretary's discretion. However, if findings that the approval conformed to the Parklands Statute were required, such findings may, by operation of law, be implied from the approval itself. Petitioners admit that the Secretary did approve the project, and Respondents admit that, in so approving it, he did not issue written findings. Cases cited by Petitioners wherein an administrative officer was required to issue findings are all distinguishable, as these are all cases where an agency hearing was required; no such hearing was required of the Secretary in approving the project.

Also, findings are not required in this case by the Administrative Procedure Act, as that Act has no application here. The Administrative Procedure Act is applicable to proceedings of the Department of Transportation, but only to the extent that the Act, by its own terms, applies. Section 553 of the Administrative Procedure Act does not require findings here, as the Secretary's approval is expressly excluded because it creates a contract under 23 U.S.C.

§106(a). Section 554 of the Administrative Procedure Act does not require findings either, as that section relates only to decisions from an agency hearing, which did not exist in this case.

The provisions of the Administrative Procedure Act regarding judicial review [5 U.S.C. §§701, *et seq.*] also have no application here. Section 701 excludes from that chapter, by its terms, "agency action . . . committed to agency discretion by law." The Secretary's approval here was a discretionary action, and is, therefore, not reviewable under the Administrative Procedure Act. Judicial review is, of course, available under the law outside that Act if it were shown that the Secretary failed or refused to exercise his discretion or acted beyond the scope of his powers, but there is no such showing here by Petitioners.

The Courts below were correct in not allowing Petitioners to take the discovery deposition of the Secretary or the former Highway Administrator. Since all relevant facts as to the approval of the projects and the things considered by the Secretary in making that approval are not in issue, the only possible subject of such a deposition would be the Secretary's mental processes in linking the two. Such a subject for discovery is precluded by *United States v. Morgan*, 313 U.S. 409 (1941).

There is no justification to the claim of Petitioners that this Court must have before it the entire administrative record in order to decide the case. There cannot be anything in the administrative record helpful to our inquiry here, as all facts relevant to the issues before the Court are either admitted or undisputed. While Respondent contends that the introduction of the administrative record is not required here by the Administrative Procedure Act, that Act not being applicable, it is Respondent's position that even if that Act were applicable, §706 thereof requires the introduction of only that part of the administrative record which the parties choose to submit. Petitioners had access to the administrative record and could have introduced whatever part they deemed helpful to their cause.

Petitioners must prove that the Secretary was arbitrary and capricious to get the relief sought, because that is the standard for relief under the law outside the Administrative Procedure Act. However, even if we assume that the Administrative Procedure Act applies here, that Act requires substantially this same standard of review. Section 706 of that Act provides that the standard of review of whether there was substantial evidence to support the approval or whether the evidence was unwarranted by the facts applies only to agency actions based on agency hearings. Since there were no hearings required here, only the "arbitrary and capricious" standard in §706 can apply.

Finally, respondent contends that there are no disputed issues of material facts in this case, such that the summary judgment granted below was proper. All facts relating to both the fact and manner of the approval of the Secretary are admitted or undisputed. Petitioners have not shown any fact which suggests that the approval of the Secretary was arbitrary or not in conformity with law. The only dispute which the affidavits submitted by Petitioners have raised in this case is a dispute as to the wisdom of the Secretary's approval. Under the long-standing rule that courts will not substitute their discretion in selecting a highway route for that of the executive, this is not a proper issue before the Court and, therefore, not material on a motion for summary judgment.

Therefore, Respondent contends that there was no error committed by the lower courts, that the decision of the Court of Appeals should be affirmed, and that the stay should be dissolved.

VI. BRIEF AND ARGUMENT OF QUESTIONS PRESENTED

In the discussion below, the five issues raised by Petitioners in their application for a stay (treated as a petition for certiorari) are treated separately. Discussion of the sixth issue suggested by Respondent, relating to the application of the Administrative Procedure Act, is integrated into the arguments on Petitioners' five suggested issues, particularly Issue Number One.

ISSUE NUMBER ONE
THE LACK OF A SPECIFIC FINDING OR WRITTEN
OPINION BY THE SECRETARY

This issue relates to the legal impact of the Secretary's failure, in approving the route and design through the Park, to issue written findings giving his reasons for the approval. As the counsel for the Secretary has stated: "It is undisputed that the Secretary, on the occasion of his 1969 approval of the Overton project, issued no written findings and wrote no opinion."²²

This is the only real issue raised by the Petitioners in the pleadings quoted earlier and was a proper issue to be decided upon a motion for summary judgment by both lower courts, since purely a question of law is presented thereby. Affidavits which show that the Secretary did *approve* the project were introduced, but were unnecessary, since petitioners have specifically alleged that the Secretary did *approve* the project. Petitioners do not contend that the Secretary did not consider the dictates of the Parklands Statute in giving that approval. In fact, it is admitted in the complaint that the Secretary conditioned his approval on design changes intended to minimize harm to the Park and that the State agreed to these design changes. Petitioners do contend that those actions and approval do not suffice; they argue that, in addition, the Secretary must go through a process of reducing to writing the various factual and opinion evidence which he might have considered in exercising his discretion, and the reasons for his approval of the highway project. The question then squarely presented is whether or not this is required by the Parklands Statute.

Both lower courts have held that this is not required. The District Court said:

"It is undisputed that the Secretary did not make such a finding but there is no such requirement in the statute, and in the absence of such a requirement we will not imply one."

²² Solicitor General's Memorandum filed in opposition to Petitioners' Application for a Stay, p. 7.

The Court of Appeals said:

"There is no requirement in the statute that the Secretary articulate his findings, nor are we free to impose such a requirement on him."

An examination of the Parklands Statute shows these courts to be correct. The Parklands Statute turns on the question of the Secretary's "approval," and that "approval" is left entirely within his sound discretion. It was both admitted and proved that the Secretary and his predecessors had given the necessary "approvals," both of the "corridor" or route and the present design.

As shown above, the Parklands Statute is entirely discretionary and in no way imposes ministerial duties on the Secretary. The legislative history previously cited shows beyond any question that Congress "unmistakenly" wanted the Secretary to exercise *his discretion* in granting or withholding his *approval* of Federal-Aid under 23 U.S.C. §138, while at the same time keeping in mind even more important factors, such as the disruption of communities and time.²³ No section of either the Department of Transportation Act or the Federal-Aid Highway Act requires the Secretary to issue written "findings" in giving or withholding his approval of a project.

There are additional reasons other than those already given why the Secretary's approval did not have to be reduced to a finding. First, it has always been a basic principle of administrative law, upheld on many occasions by this Court, that under circumstances as presented here, "findings" can be implied.

The weight of authority both in the State and Federal

²³ The Federal-Aid Highway Act specifically states that time is of the essence in the early completion of the "Interstate System" since many highways are inadequate to meet the needs of local and interstate commerce or national and civil defense. It further states that early completion of the System is "one of the most important objectives of this Act," and is essential to the national interest [23 U.S.C. §101(b)]. Respondent submits that the Secretary is charged with administering this entire Act, not just §138 alone.

judicial systems is that when an executive or administrative officer is granted discretion by the legislative body, as here, findings, if required at all, are implied from the action taken [see Vol. 2, Davis, *Administrative Law Treatise*, 1958, §16.07].

As early as 1827, this Court, speaking through Mr. Justice Story, proclaimed this principle [*Martin v. Mott*, 25 U.S. (12 Wheaton) 19 (1827)]. In that case, the President, by an act of Congress, had been given the power to call out the militia in the event certain specified conditions threatening the national safety were found to exist. The President called out the militia of the state of New York without stating or reciting that any of the conditions existed, or that he had found, in his judgment, that they did exist. In holding that the necessary findings were implicit in the President's order, this Court said, at page 14:

"But it is now contended, as it was contended in that case, that notwithstanding the judgment of the President is conclusive as to the existence of the exigency, and may be given in evidence as conclusive proof thereof, yet that the avowry is fatally defective, because it omits to aver that the fact did exist. The argument is, that the power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute, and therefore it is necessary to aver the facts which bring the exercise within the purview of the statute. In short, the same principles are sought to be applied to the delegation and exercise of this power intrusted to the Executive of the nation for great political purposes, as might be applied to the humblest officer in the government, acting upon the most narrow and special authority. It is the opinion of the court, that this objection cannot be maintained. When the President exercises an authority confided to him by law, *the presumption is, that it is exercised in pursuance of law*. Every public officer is presumed to act in obedience to his duty, until the contrary is shown;

and a *fortiori*, this presumption ought to be favorably applied to the chief magistrate of the Union.”
[emphasis added]

This Court has continued to rule that the holdings of Mr. Justice Story apply to orders of administrators as well as the President [see *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935); *Thompson v. Consolidated Gas Co.*, 300 U.S. 55 (1937); *United States v. Rock, Royal Co-Op.*, 307 U.S. 533 (1939)].²⁴

There is a corollary to this rule which is also relevant to the issue raised by Petitioners concerning the necessity of showing arbitrary or capricious conduct on the part of the Secretary. The Court of Appeals, on page 4 of its opinion, correctly stated this additional rule with ample authority, as follows:

“In addition to the narrow scope of review of administrative action, plaintiffs are faced with the additional burden of overcoming a presumption of regularity afforded the acts of an administrator. See *Goldberg v. Truck Drivers Local Union No. 299*, 293 F.2d 807, 812 (6th Cir.), *cert denied* 368 U.S. 938 (1961); *Nolan v. Rhodes*, 251 F.Supp. 584, 587 (S.D. Ohio 1965), *affm'd* 383 U.S. 104 (1966). The presumption of regularity is a particularly strong one. See, e.g., *Braniff Airways, Inc. v. C.A.B.*, 379 F.2d 453 (D.C. Cir. 1967).”

The authorities heretofore cited by Petitioners in support of their position that a “finding,” in addition to “approval,” was necessary, are easily distinguished. All are cases which involved statutes where a quasi-judicial “hearing” of some

²⁴ The case of *United States v. Baltimore & Ohio R.R.*, 293 U.S. 454 (1935) is seemingly out of line with these holdings. As pointed out by Professor Davis in his treatise, *supra*, the Court's decision in this case may have been influenced by the fact that it was decided the same day as *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), which involved a bad example of administrative abuse. The dissenting opinion by Mr. Justice Cardozo in this case is particularly enlightening on this subject.

sort was required to be held.²⁵ Normally in such situations, one would expect some sort of finding to be rendered. The Parklands Statute does not require or even suggest any sort of hearing.

The only hearings of any kind required by any statute here relevant are those conducted by the State, not the Secretary, under 23 U.S.C. §128. These hearings are of the "informational" type required to be conducted by the State, and are not under the control of the Secretary, although the transcript and accompanying documents are sent to the Department. These hearings would not require any findings by the Secretary, who does not even participate in them personally or by delegation.²⁶

²⁵ For example, *Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87 (1968), *Reh. Den.* 393 U.S. 1124 (1969), was a case where this Court required the Interstate Commerce Commission to make specific findings regarding their prescription of the divisions of joint rates for certain railroads, under 49 U.S.C. §15 (6), which statute requires that the rates described therein be determined "after full hearing upon complaint or upon its own initiative" This statute, under which the Commission operated, also required that the Commission prescribe these rates "by order." This is a very different thing from an "approval" as required in the Parklands Statute. An "order" is defined in the Administrative Procedure Act as the result of an adjudication [5 U.S.C. §551 (6)], which is a hearing on the merits of an issue in controversy [§§551(7), 554(a)], there what rates were just. Where, as in the *Baltimore & Ohio* case, agency hearings resulting in an order are required, then it follows that the Administrative Procedure Act required detailed findings as to the results of that hearing and reasons for that order. *United States v. Carolina Carriers Corp.*, 315 U.S. 475 (1942), quoted by Petitioners, is another case where an agency quasi-judicial hearing was being reviewed.

²⁶ The full transcript of these hearings in this case is already part of this record, so that if it were material to the issues, it would not need to be supplied by the production of an "administrative record" on remand. Petitioners claimed below that the §128 hearings held on the subject project were blemished by certain procedural defects. Both lower courts found no such defects, and Petitioners appear to have abandoned this claim in this Court.

Therefore, Respondent contends that it is established that the Parklands Statute gives the Secretary a discretionary power to approve or not approve the project; that he did approve it; that "findings" are not required by the Statute, but, if "findings" were required, these may be implied from his approval; that his acts are accompanied by a strong presumption of regularity not overcome by any evidence or allegation on the part of Petitioners; and that no quasi-judicial hearing is required by the Parklands Statute which could be a basis for such "findings."

Any discussion of the necessity of written and detailed findings by the Secretary in this case must take into account the application and impact of the Administrative Procedure Act [Pub.L. 89-554, Sept. 6, 1966; 5 U.S.C. §551, *et seq.*]. First, the State certainly concedes that the Administrative Procedure Act is expressly made applicable to "proceedings by the Department" of Transportation by §6(h) of the Department of Transportation Act [49 U.S.C. §1655(h)] which reads as follows:

"(h) The provisions of subchapter II of chapter 5 and of chapter 7 of Title 5, shall be applicable to *proceedings by the Department and any of the administrations or boards within the Department established by this chapter except that notwithstanding this or any other provision of this chapter, the transfer of functions, powers, and duties to the Secretary or any other officer in the Department shall not include functions vested by subchapter II of chapter 5 of Title 5, in hearing examiners employed by any department, agency, or component thereof whose functions are transferred under the provisions of this chapter.*" [Emphasis added]

By 49 U.S.C. §1655(h), the Administrative Procedure Act is made applicable to "proceedings by the Department and any of the administrations or boards within the Department," but it does not apply to approvals by the Secretary. The term "proceedings" implies hearings and similar agency adjudications, but not discretionary approvals by

the Secretary himself. More important, this section does not purport to enlarge the scope of the Administrative Procedure Act itself; it merely states that, for the Department of Transportation, as for other departments of the government, the Administrative Procedure Act applies according to its own terms. Therefore, to determine the application of the Administrative Procedure Act to the approval of the Secretary now in question, we must look to the terms of that Act.

Subchapter II of Chapter 5 of the Administrative Procedure Act [5 U.S.C. §§551-559] is the part thereof relevant to the question of whether the Secretary was required to make findings here. One cannot contest that the Administrative Procedure Act does require, in many instances, findings such as Petitioners seek; the question here is whether the Secretary's approval of the route through Overton Park is one of those instances.

The Department of Transportation Act holds the Administrative Procedure Act Applicable to "proceedings," a term defined in 5 U.S.C. §551(13) as either "rule making," "adjudication," or "licensing." There can be no question that the approval of the route by the Secretary was not licensing. However, since by definition, "licensing" is included within the definition of "adjudication" [see together 5 U.S.C. §551(6) and (7)], if the sections of the Administrative Procedure Act regarding "adjudication" do not apply here, "licensing" is also excluded. One must then inquire if the provisions of the Administrative Procedure Act governing the proceedings "rule making" or "adjudication" apply to the Secretary's approval.

Section 553 of the Administrative Procedure Act. [5 U.S.C §553] governs its applicability to rule making. That section reads in relevant part:

"(a) This section applies, according to the provisions thereof, except to the extent that there is involved— . . .

(2) a matter relating to agency management or

personnel or to public property, loans, grants, benefits or contracts."

Looking to the Federal-Aid Highway Act, we see that the approval of the Secretary in this instance is a "grant" and a "contract," taking that approval out of the view of the Administrative Procedure Act. First, the whole impact of the Federal-Aid Highway Act, of which the Parklands Statute is a part, is to make grants to the many states for the construction of highways [see 23 U.S.C. §101, *et seq.*]. More specifically, §138 of that Act relates to the Secretary's approval of a project, which approval is governed by §106 of the Act. This latter section states that the Secretary's "approval of any such project shall be deemed a contractual obligation of the Federal Government" [23 U.S.C. §106(a)]. Therefore, by the explicit terms of the Federal-Aid Highway Act, the Secretary's approval of the route is excluded from the requirements of §553 of the Administrative Procedure Act.

Section 554 of the Administrative Procedure Act governs its applicability to adjudications. This section, by its explicit terms, applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing" The section then proceeds to determine the procedure for such hearings, being in the nature of quasi-judicial hearings to reach "a *final* disposition" [5 U.S.C. §551(6)] of the matter in controversy. Since §554 applies here only if the Federal-Aid Highway Act requires a determination "on the record after opportunity for an agency hearing," an examination of the Federal-Aid Highway Act reveals that no such determination or agency hearing is required thereby, taking the Secretary's approval outside the view of §554. The only mention of a hearing in the Federal-Aid Highway Act is in §128 thereof, which requires as a condition precedent for receiving Federal aid a hearing to be held by the state highway department. The function of this hearing, as stated in the section, is to insure that the state highway department has considered certain aspects of highway planning, such as social

impact, and has given interested persons an opportunity to express their views. It is not a quasi-judicial hearing [see *Hinrichs v. Iowa State Highway Commission*, 260 Iowa 1115, 152 N.W.2d 248 (1967)], nor a hearing for the purpose of reaching a "final disposition" of an issue in controversy. It is a fact-gathering or informational hearing, designed to enable the state highway department to gather certain opinions and information and offer explanations of its plans to local citizens. [For legislative history to this effect, see 1968 *U.S. Code Cong. & Adm. News*, p.3491.] Most important, the hearing contemplated is one conducted by the *state* highway department, not an *agency* hearing. Nowhere does the Federal-Aid Highway Act require an *agency* hearing, as contemplated as a condition for the application of §554 of the Administrative Procedure Act.²⁷ Therefore, §554 does not apply to the present situation.

Concluding, we see that neither of the types of "proceedings" covered by the Administrative Procedure Act — rule making or adjudications — encompasses the approval of the Secretary here in question. Therefore, the Secretary's approval is not a "proceeding" within 49 U.S.C. §1655(h), and is not governed by the Administrative Procedure Act. This being the case, the Administrative Procedure Act places no obligation on the Secretary to make findings when approving a highway project.

Petitioners may argue that such a construction renders 49 U.S.C. §1655(h) meaningless. A casual glance at the Department of Transportation Act obviates this argument. That Act transferred to the then newly-created Depart-

²⁷ Where, as here, the particular governing statute regarding a Secretary's action (here the Federal-Aid Highway Act and the Department of Transportation Act), does not provide for an agency hearing, no requirement for such a hearing is implied into that particular statute by the Administrative Procedure Act. "The Administrative Procedure Act does not impose any requirement of an adversary hearing before an agency; it merely specifies the procedure to be followed when a hearing is required by some other statute." *United States v. Walker*, 409 F. 2d 477 (4th Cir., 1969).

ment of Transportation many functions other than approval of highway projects, and most of these other functions are brought within the purview of the Administrative Procedure Act by 49 U.S.C. §1655(h). As a few examples, the proceedings of the National Traffic Safety Bureau [49 U.S.C. §1652(f)], the National Transportation Safety Board [49 U.S.C. §1654], and the Federal Aviation Agency [49 U.S.C. §1655(c)] are transferred to or established in the Department of Transportation, and these would be governed by the Administrative Procedure Act.

Not only do the provisions of the Administrative Procedure Act governing the making of findings and other procedure within the agency not apply to the Secretary's approval, but also the provisions of that Act regarding judicial review have no application. These are found in Chapter 7 of the Administrative Procedure Act [5 U.S.C. §701, *et seq.*].

Section 701(a), 5 U.S.C., reads:

"(a) This chapter applies, according to the provisions thereof, except to the extent that— . . .

(2) agency action is committed to agency discretion by law."

Not only is the purely discretionary nature of the Secretary's approval shown by the language of the Parklands Statute, but the legislative history, quoted above, shows that Congress intended that the selection of a route through a park is within the sole discretion of the Secretary [1968 *U.S. Code Cong. & Adm. News*, p.3538] Because this approval is explicitly committed to agency discretion by Congress, Chapter 7 of the Administrative Procedure Act has no application.

This Court, as well as the lower Federal courts, has consistently held that an action of an executive, left by law within his discretion, is made nonreviewable by the courts under the Administrative Procedure Act [5 U.S.C. §701(a) (2); *Schilling v. Rogers*, 363 U.S. 666, 674 (1960); *Panama Canal Co. v. Grace Line*, 356 U.S. 309, 317 (1958)]. Professor Davis has stated that this exclusion of judicial re-

view applies not only to rule making and adjudications left within agency discretion, but also to all discretionary actions of the executive, including cabinet members [Vol. 4 Davis, *Administrative Law Treatise*, 1958, §28.16²⁸]. This leaves judicial review of the Secretary's approval under the provisions of law in effect without application of the Administrative Procedure Act.²⁹ There is no basis for any such review here, however, as, in the *Schilling* case, *supra*, "This is not a case in which it is charged [by Petitioners] that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope of his powers" [363 U.S. at p.676]. For administrative actions committed by law to agency discretion, and thereby outside the scope of judicial review provided in the Administrative Procedure Act, judicial review is available only if it is charged that the Secretary had acted outside the scope of his discretion given by Congress. No such charge is made, Petitioners limiting their complaint to the

²⁸ Professor Davis also states, regarding 5 U.S.C. §701(a) (2), that this Section appears to hold that agency actions committed by law to agency discretion are not reviewable by Courts even if such actions are alleged to be arbitrary or capricious. We need not go so far in the present case, because, as will be shown in the discussion of Issue Number Four, Petitioners have made no charge that any action taken by the Secretary was arbitrary or capricious [see also 5 U.S.C. §101, which deems the Department of Transportation an "Executive Department"].

²⁹ The Transportation Department Act, in this regard, provides that orders or actions of the Secretary in the exercise of functions transferred to him by that Act, such as the approval of highway projects, shall be subject to judicial review to the same extent as they were before the transfer. The Transportation Department Act specifically does not purport to enlarge the scope of judicial review of the Secretary's actions [see 49 U.S.C. §1653(c)].

charge that the Secretary failed to make written findings (and others not here relevant).³⁰

Even if this were not a discretionary action on the part of the Secretary, and judicial review under the Administrative Procedure Act were possible, this would not lead to a reversal on the question of findings for two reasons. First, findings as required by the Administrative Procedure Act are not applicable to this Secretarial approval, as shown above. Second, even if such findings were required, the failure to make them would be harmless error. The Administrative Procedure Act states that in a judicial review of administrative action, "... due account shall be taken of the rule of prejudicial error" [5 U.S.C. §706].

In *Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*, *supra*, this Court faced the contention of a charterer of a ship owned by the Federal government that the Maritime Commission had erred in setting charter rates without articulating which section of the Merchant Ship Sales Act of 1946 it relied on. This is quite similar to Petitioners' claim in the present case that they were harmed by the Secretary's failure to make written findings. In *Massachusetts Trustees*, *supra*, this Court held that "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached, as in this instance (assuming

³⁰ In *Sugarman v. Forbragd*, 405 F. 2d 1189 (9th Cir., 1968), *Cert. Den'd.* 395 U.S. 960 (1969), an importer sought judicial review of the decision of the Secretary of Health, Education and Welfare to restrict his import of certain food under 21 U.S.C. §381(a). The Ninth Circuit held that review was not available as this was a discretionary action of the Secretary, and there was no allegation of arbitrary or capricious action on the part of the Secretary allowing review outside the scope of the Administrative Procedure Act. As the Court stated at page 1190, "While the superficiality of tests and inspections or an arbitrary refusal to accept their results may be appropriate subjects for judicial review, a dispute as to what an examination has established or disclosed is more appropriately left to agency expertise." [See also *Mollohan v. Gray*, 413 F. 2d 349 (9th Cir., 1969)].

there was such a mistake) . . . " this would be harmless error not justifying reversal [377 U.S. at p.248]. The Secretary's actions here fall within that definition. If we assume that the Secretary did err in failing to make written findings, this is not prejudicial. No contention is made that the Secretary failed to approve the route; whether his reasons for approving the route were mentally recorded or committed to paper would not affect the substance of his approval or the procedure employed to make that approval.

In conclusion, it is the State's position that neither the administrative procedure nor judicial review provisions of the Administrative Procedure Act applies to the approval of the Secretary in this instance, that absent the Administrative Procedure Act, no findings were required of the Secretary by the Parklands Statute, and, the Administrative Procedure Act being inapplicable, no findings were required by that Act.³¹

³¹ The Solicitor General, in oral argument and prior brief to this Court regarding the Petitioners' Application for a Stay, stated that the Secretary has now promulgated a regulation under which he will issue findings hereafter in cases such as this. While Respondent considers this irrelevant to the present case, it is merely another example of the Secretary's discretion. If the Secretary has discretion to approve the project, then he certainly has discretion to make or not make written findings regarding any such approval, in individual cases or by general regulation. Since the Secretary did not purport to affect prior approvals by this regulation, it is without application here.

It may be argued on the strength of cases such as *Thorpe v. City of Durham*, 393 U.S. 268 (1969) that the Secretary's regulation, D.O.T. 5610.1, issued October 7, 1970 (almost 10 months after this lawsuit was begun and over a year after admitted approval was given), has retroactive effect here, even though not intended by its terms. Such an argument would have no legal basis, since the *Thorpe* case was intended to apply only where the parties had not changed their respective positions prior to the change in the regulation. In this case, this respondent has changed positions by purchasing the land and the City has spent part of the proceeds. Further, the National Environmental Policy Act which did not take effect until January 1, 1970 (after this case was started) was one of the major reasons for the promulgation of the regulation. A careful reading

ISSUE NUMBER TWO
WAS ERROR COMMITTED BY THE LOWER COURTS'
REFUSAL TO ALLOW THE TAKING OF THE DEPO-
SITION OF LOWELL K. BRIDWELL?

Petitioners, in the District Court, sought to take the deposition of the former Highway Administrator, Lowell K. Bridwell. The Secretary obtained a protective order; Petitioners were thus prohibited from taking said deposition; and Petitioners now claim this to be error.

In discussing this issue, one must first bear in mind that the protective order was issued when the case was before the Court for determination on the Secretary's motion to dismiss, later replaced by his motion for summary judgment, in which the State joined. The Court thus was to determine if there were any material issues of fact to which a deposition would be relevant. As the record developed, Petitioners admitted that the Secretary approved the project and raised only the issue that he did not state in writing the findings upon which that approval was based. The Secretary and the state of Tennessee admitted that the Secretary did not issue these written findings and introduced the affidavits described above, showing the items, information, and matters considered by the Secretary in making his approval of the route.³² There is no allegation in the complaint claiming anything specific that the Secretary should have considered but did not, nor is there any evidence in the record to support such an allegation. Therefore, no issue of fact exists as to what the Secretary considered. Petitioners now seek to raise an issue of fact, however, as to the weight, effect, and implications of the items considered. Thus, the only question remaining to which a deposition could apply is that of the mental processes of the Secretary or Administrator in relating the information available to him to his approval. No issue exists as to that information or the ap-

³² Petitioners now claim that they seek to prove by this deposition that Administrator Bridwell did not approve the route at some point, but this is contrary to Petitioners' allegation in their Complaint that the Administrator did, indeed, approve the route.

proval; Petitioners seek to depose Mr. Bridwell as to the mental links between the two. Based on the record before us, the mental processes of this individual are the only subjects a deposition could logically touch on; since these are, by long-standing law, not a proper subject for either discovery or evidence at a trial, the Courts below were correct in respectively issuing and affirming the protective order. The same argument would apply equally as well to the taking of the deposition of the Secretary.

The Court held in *United States v. Morgan*, 313 U.S. 409 (1941), that such an inquiry into the mental processes by which an administrative official reached a decision is improper. In that case, the Secretary of Agriculture was called as a witness at the trial of the cause and an issue, not here relevant, was made on appeal to some of his testimony. This Court said, at page 422: "But the short of the business is that the Secretary should never have been subjected to this examination . . . We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary.' 304 U.S. 1, 18. Just as a judge cannot be subjected to such scrutiny, . . . so the integrity of the administrative process must be equally respected." Lower courts have followed this decision with much consistency. For example, in *Braniff Airways, Inc. v. C.A.B.*, 379 F.2d 453 (D.C. Cir., 1967), the Court, citing *Morgan*, held that "The general rule remains that a party is not entitled to probe the deliberations of administrative officials, oversee their relationships with their assistants, or screen the internal documents and communications they utilize We cannot allow the recital by an administrative agency that it has considered the evidence and rendered a decision according to its responsibilities to be overcome by speculative allegations." The rule has specifically been held to apply with greater force in a situation where the administrative official is given discretion by Congress to reach his decision [*N.L.R.B. v. Sun Drug Co.*, 359 F.2d 408 (3rd Cir., 1966)].

Petitioners devote much attention to *D.C. Federation of*

Civic Assn's, Inc. v. Volpe, ____ F.2d ____ (D.C. Cir. April 6, 1970, No. 23870), on remand 316 F.Supp. 754 (D.C.C. 1970), citing the opinion of the District Court on remand [and *D.C. Federation of Civic Assn's, Inc. v. Sirica*, ____ F. 2d ____ (D.C. Cir. May 8, 1970, No. 24216)] as authority for their contention that they are entitled to take the depositions in question here. Actually, this case is not authority for that point, but is readily distinguishable from the instant case. In the *D.C. Federation* case, the plaintiffs had charged that Volpe had approved the particular highway project there in question because of extreme political pressure, such that the approval was a result of personal arbitrary conduct on the part of the Secretary. Discovery was allowed to investigate the merits of this charge. In the instant case, Petitioners have made no such charge; they merely want to go behind the admitted approval to attempt to discover the reasons for it. Thus, in the *D.C. Federation* circumstances, which the Trial Court characterized as "unique," discovery was allowed as to specific charges of misconduct; in the instant case, the only possible subject of discovery is the mental processes of the Administrator or Secretary leading to the approval; this cannot be allowed.

The *D.C. Federation* case is suggestive of one Court's thinking on many other points in controversy here. In the District Court opinion on remand (316 F. Supp. 754), the Court responded to some issues raised by Petitioners in the instant case. For example, the District Court properly interpreted the Parklands Statute as vesting a purely discretionary authority in the Secretary. The Court further held, citing the District Court opinion in the instant case, that the Secretary is not required to make written findings as to the reasons for his approval under the Parklands Statute, since his approval is entitled to the presumption of regularity discussed above. In addition, the District Court in *D.C. Federation* followed substantially the same reasoning as Respondent in arriving at the proper standard of judicial review of the Secretary's approval under the Administrative Procedure Act (assuming that the Act applies). The Plain-

tiffs in the *D.C. Federation case*, in their *amici curiae* brief in the instant case, cite their case as authority on the discovery issue, but attempt to explain away the other holdings of the District Court by showing that they have appealed. *Amici curiae* also do not point out the substantial difference between their case and the one under review here, namely that in their case, they had alleged, based on proper information, that the Secretary arbitrarily based his approval on political pressure. No such charge is present in the instant case.

Since, based on the record in this case, the only subject which a deposition of the Secretary or the former Highway Administrator could explore is their mental processes in approving the route, a subject not proper for discovery under this Court's rulings, the lower Courts were correct in denying such discovery procedure to Petitioners.

ISSUE NUMBER THREE
CAN THIS COURT PROPERLY REVIEW THIS CASE
WITHOUT REFERENCE TO THE FULL ADMINISTRA-
TIVE RECORD?

By this issue, Petitioners contend that Federal appellate courts cannot properly determine the other issues in this case without having the full administrative record before them. It is difficult to determine the exact position of the other parties on this issue. The Solicitor General filed a memorandum in opposition to Petitioners' application for a stay, in which he maintained that Petitioners claim that the administrative record was needed was "without merit."³³ Shortly thereafter, the Solicitor General filed a motion to remand, suggesting that this case be remanded to the District Court for the purpose of having the administrative record introduced into evidence. Petitioners, of course, raised this issue in their application for a stay (treated by the Court as a petition for certiorari), but opposed the Solicitor General's motion. By contrast, Respondent Speight has maintained at all times, both in response to the application for a stay and in opposition to the Solicitor General's motion to remand, that there is no basis or need for the entire administrative record to be before the lower courts or this Court.

Petitioners made no effort in the District Court to obtain introduction of the administrative record or any part thereof not part of the record in this case. No affidavit of Petitioners stated that the record was unavailable to them or that they wished any part of it presented to the District Court. Petitioners made no motion in the District Court for production of the administrative record or any part thereof. This issue was first raised by Petitioners in the Court of Appeals. It should be deemed waived by Petitioners at that level for failure to raise it in the District Court.

³³ See page 10 of this memorandum. At page 7 of this same memorandum, the Solicitor General agrees, at least in part, to this Respondent's contentions concerning the inapplicability of the Administrative Procedure Act.

Moreover, the record is clear that the entire administrative record was made available to counsel for Petitioners, who could have examined it and introduced whatever part he deemed beneficial to his clients' cause. In fact, the affidavit of Petitioners' counsel [App., p. 61] shows that documents and letters which he filed in the cause were provided to him by the Bureau of Public Roads. While some controversy developed between Petitioners' counsel and the Solicitor General as to the availability of the administrative record to Petitioners, it is easily concluded from the record that Petitioners did have the opportunity to examine the administrative record and did, in fact, insert some items therefrom in the record in the District Court.³⁴ Having had this opportunity to examine and introduce the administrative record themselves, Petitioners should be estopped to complain that Respondents failed to introduce it.

In considering this question, we must ask what is the "administrative record"? This is open to some speculation, since neither Petitioners in their arguments below or to this Court on application for a stay, nor the Solicitor General in his motion to remand, has suggested to this Court what might be in the administrative record which could be relevant to the issues before the Court. The affidavits introduced,³⁵

³⁴ See the attachments to Mr. Vardeman's affidavit concerning one of the studies made of one of the alternate routes. If, as Petitioners contend, the Administrative Procedure Act is applicable to the Secretary's approval, Petitioners were further entitled to examine the administrative record under 5 U.S.C. §552.

³⁵ Petitioners argue that Respondents' affidavits contained in the record are somehow defective because obtained for the purpose of this litigation. While, of course, that was the purpose of making these affidavits (what other purpose for making such affidavits could there be?), this does not in any way affect the validity of the affidavits or truth of the statements therein. By contrast to the affidavits introduced by Petitioners, all given by persons whose interest in this highway project is limited to this lawsuit or who were hired to testify in this case, all of Respondents' affidavits are from persons working on the project long before the lawsuit was hatched or having no direct participation in the project at all.

particularly the Swick affidavit [App., p. 27], show that the Secretary considered many plans for alternative routes, engineering studies, social impact studies, and a host of other relevant data in reaching his approval of the project. One can certainly assume that these items are in the administrative record, but these items would not be relevant to any issue before the Court. These could be relevant only on the question of the wisdom of the Secretary's approval of the route, which is not, and cannot properly be, an issue here, or to a claim that the Secretary arbitrarily ignored these items in reaching his approval, but no such claim has been made by Petitioners.

Perhaps what we know is *not* in the administrative record is more instructive to the question of the propriety of its introduction than what we can guess might be in it. The principal issue in this case is whether the Secretary was required to evidence his admitted approval of the project with written findings. All parties admit that the Secretary made no written findings as such, so that none would be found in the administrative record. All parties have admitted that the Secretary did approve the route and design of the highway, and that in so doing, required certain changes, which the State accepted. Thus, one would expect nothing to appear in the administrative record which enlarges on this approval. Since it is admitted that the administrative record contains nothing beyond what is already introduced which is relevant to the issues to be decided, what conceivable purpose (other than delay) could an introduction of the entire administrative record serve?

There is nothing in either the Federal-Aid Highway Act or the Department of Transportation Act which even suggests that the administrative record should be before this Court. In fact, the purely discretionary nature of the Secretary's approval suggests the contrary, absent a contention that the Secretary failed to exercise his discretion or arbitrarily ignored the policy guidelines in those statutes [see discussion under Issue Number One above]. Therefore, if the administrative record is required to be presented to the

Court, it can only be under the Administrative Procedure Act.

Respondent has strongly suggested to the Court that the Administrative Procedure Act has no application to this case, either in determining intra-agency procedure or judicial review. This discussion will not be repeated here. However, even should we assume (without admitting) that the judicial review provisions of the Administrative Procedure Act were applicable here, the necessity for introduction of the entire administrative record would be required only under §706 thereof [5 U.S.C. §706].

Petitioners have claimed that the admission of the administrative record is required by 5 U.S.C. §706, and this contention seems to be the basis for their entire argument on this point. In advancing this point in their brief and in their application for a stay, Petitioners quote §706, only in part, to read "the Court shall review the whole record . . . ,"¹ replacing the following phrase with dots of omission—this phrase is "or those parts of it cited by a party" This part of §706 reads in its entirety:

"the court shall review the whole record or *those parts of it cited by a party*, and due account shall be taken of the rule of prejudicial error." [emphasis supplied]

Petitioners have thus covered up a large point with four small specks.

Section 706 of 5 U.S.C., read in its entirety, makes it clear that Congress did not intend that an administrative action be reviewable only if the Court has before it the whole administrative record. It has been held under this section that the requirements thereof are met when the Court has before it those parts of the administrative record which the parties choose to present, and that if a party fails to present to the Court some part of the administrative record he deems relevant or material, he cannot later complain of its absence [see *Bartusch v. Washington Metropolitan Area Transit Commission*, 344 F.2d 201 (D.C. Cir., 1950)].

Petitioners contend that the administrative record is nec-

essary to determine if the Secretary's approval was sufficient to comply with the Parklands Statute. This argument begs the question. Since everything the Secretary did in approving the project is admitted, there is no light the administrative record can shed on this issue if, indeed, a valid issue it be. Petitioners also contend that the administrative record is necessary to enable this Court to determine if the Secretary's approval was arbitrary or unsupported by substantial evidence (claims not raised in the complaint). This is a circular argument, going something like this: (1) the Administrative Procedure Act applies; (2) therefore, we look at the Secretary's approval to see if it is arbitrary; (3) to do this, we need the whole administrative record; (4) the production of the whole administrative record is required by the Administrative Procedure Act; (5) therefore, the Administrative Procedure Act applies. The gate out of this maze is the nonapplication of the Administrative Procedure Act, shown regarding Issue Number One above.

The fact is that Petitioners did not allege in their complaint or argue in the District Court on the motion for summary judgment under Rule 56,³⁶ Federal Rules of Civil Procedure, that any action of the Secretary was arbitrary or unsupported by substantial evidence. Even if this Court were to accept this new argument here, we should note that there is no evidence in the record or allegation in the complaint to substantiate it; it is based solely on Petitioners' statements to appellate courts. As this Court stated in *Schilling v. Rogers*, *supra*: "However, such conclusory allegations [of arbitrary and capricious action by an administrator] may not be read in isolation from the complaint's factual allegations" [see also *Braniff Airways, Inc. v. C.A.B.*, *supra*; *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676 (9th Cir., 1949), *Cert. Den'd*, 388 U.S. 860 (1949), where this point as well as the presumption of administrative regularity, is discussed.

³⁶ This rule also suggests the use of affidavits as the proper means of submitting evidence to the Court.

Petitioners, in Footnote No. 19 to their brief on the merits, admit that Respondent's contention that they have not raised any issue of arbitrariness by their complaint or otherwise is correct. They then cite a part of Rule 15(b) of the Federal Rules of Civil Procedure in an attempt to save the issue. This Rule, however, does not pertain to issues of law determined under Rule 56, but deals entirely with trials on the merits and the amendment of pleadings to conform to evidence properly admitted at such a trial. Petitioners apparently contend that this issue, raised only in conclusory statements of counsel, is saved by Respondents' express or implied consent derived somehow from this Respondent's argument that there is no such issue. Under Petitioner's reasoning, the only way Respondent could have avoided this issue would have been to ignore it.

Petitioners seem to argue that whether or not this Court should hold that written findings are required, what the Secretary did was arbitrary, and the Court must look at the administrative record to weigh the degree of arbitrariness. This argument overlooks the long-standing rules regarding the presumption that the action of the Secretary is correct and regular, absent sufficient allegations to the contrary [see *O'Dwyer v. Commissioner of Internal Revenue*, 266 F.2d 575 (4th Cir., 1959)]. The Court of Appeals answered Petitioners' contentions in this regard at page 4 of its opinion, which answer Respondent adopts:

"It [the presumption of regularity] also makes it clear that a party opposing a summary judgment must do more than merely assert that the Administrative actions were unlawful. He must be able to show by affidavit, or other evidence, that there is at least a possibility that he will be able to overcome the presumption of regularity."

Therefore, Respondent contends, as he did in opposition to the Solicitor General's motion to remand, that there is

no basis, either in statutory law or in terms of relevance to the issues in this case, upon which a Court reviewing the Secretary's approval of the highway project must have before it the entire administrative record.

ISSUE NUMBER FOUR
MUST THE PETITIONERS SHOW THAT THE SECRETARY'S APPROVAL WAS ARBITRARY OR CAPRICIOUS IN ORDER TO OBTAIN RELIEF?

In this issue, as stated in their application for a stay, Petitioners raise the question of which standard provided for judicial review in the Administrative Procedure Act, the "arbitrary and capricious" standard [5 U.S.C. §706(2) (A)] or the "unsupported by substantial evidence" standard [5 U.S.C. §706(2) (E)] applies to a judicial review under the Administrative Procedure Act of the Secretary's approval of the highway project in question. Of necessity, this issue presupposes that the judicial review provisions of the Administrative Procedure Act have application to this case. Because of the exclusion in 5 U.S.C. §701 of judicial review of discretionary actions, Respondent contends that the Administrative Procedure Act has no application herein as a basis for judicial review; therefore the question posed by Petitioners in this issue becomes moot.

However, even assuming that the judicial review provisions of the Administrative Procedure Act did apply here, Petitioners are incorrect in their conclusion that the "substantial evidence" standard applies. Section 706(2), 5U.S.C. states in relevant part:

"The Reviewing court shall— . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] . . .

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute"

The "substantial evidence" test applies only to those cases subject to §§556 and 557 of the Act, which sections prescribe certain procedures for agency hearings, or cases otherwise

reviewed on the record of an agency hearing. A statutory prerequisite for the application of this standard is that there be a review of the record of an agency hearing. As shown above, neither the Federal-Aid Highway Act, the Department of Transportation Act, nor the Administrative Procedure Act requires an agency hearing prior to the Secretary's approving a highway project. The only hearing provided for is a *state* informational hearing [23 U.S.C. §128], not an *agency* hearing of any kind. Thus, by the terms of the statute, if any enumerated standard applies here, it must be the "arbitrary and capricious" standard.

Petitioners rely on the dissent of Judge Celebrezze in the Court of Appeals to substantiate their claims in this regard. While most of the reasons given by Judge Celebrezze have already been answered, it is important respectfully to note certain major defects in his opinion. Judge Celebrezze seems to doubt either the skill or the motives of the Secretary in giving his approval of the route, and appears desirous of substituting the abilities of the Court for those of the Secretary in making the route selection. However, this Court has long held that it will not allow its judgment to be substituted for that of an executive in determining the wisdom of the location or other such details of a public project [see *Berman v. Parker*, 348 U.S. 26 (1954)].³⁷ It has been held

³⁷ *Berman v. Parker*, and the multitude of cases holding that Courts will not replace the discretion of the executive with their own in regard to the placement and construction of public projects, does not either hold or imply that this Court cannot construe the Parklands Statute, or, in so doing, determine (upon proper allegations and proof) if the Secretary's approval conformed to the policy standards in that statute. The Parklands Statute does not alter the effect of *Berman v. Parker* at all; looking at the two together, the law still is that a Court will not, under the Parklands Statute, apply its wisdom over the wisdom of the Secretary to determine if alternate routes are "feasible or prudent," or if alternate designs are "possible." All a Court should do under the *Berman* holding, in applying the Parklands Statute, is determine if the Secretary himself made these decisions in good faith. Petitioners, and apparently Judge Celebrezze, would have this Court determine what routes are feasible or prudent, thus violating the rule in *Berman*.

that such substitution of judgment is improper, even on cases decided under the Administrative Procedure Act [*Udall v. Washington, Virginia & Maryland Coach Co., et al.*, 398 F.2d 765 (D.C. Cir., 1968); *Willapoint Oysters Co. v. Ewing, supra*; *Braniff Airways, Inc. v. C.A.B., supra*]. Judge Celebrezze suggests that if courts review decisions of the N.L.R.B. and municipal traffic courts in this manner, why not those of the Secretary? However, the cases show that courts are equally hesitant to substitute their judgment for that of the N.L.R.B. in analogous situations [*N.L.R.B. v. Sun Drug Co., supra*; *Singer Sewing Machine Co. v. N.L.R.B.*, 329 F.2d 200 (4th Cir., 1964)]; Respondent is certain the same rules apply to municipal traffic courts.

Since Petitioners have not alleged any facts which would bring into play either standard specified in 5 U.S.C. §706, the question again appears moot. However, assuming that such necessary allegations were present and the Administrative Procedure Act did apply, Respondent contends that the "arbitrary and capricious" standard is the proper one.

Petitioners assert, for the first time in their brief on the merits, that if the standard in 5 U.S.C. §706(2) (E) does not apply because no hearing is required by statute (as Respondent contends), then the "unwarranted by the facts" standard indicated in 5 U.S.C. §706(2) (F) applies, requiring a trial *de novo*. This argument, of course, assumes that Chapter 7 of the Administrative Procedure Act applies, which Respondent contends is not the case, because the Secretary's approval is committed by law to his discretion. However, again assuming that this chapter does apply, the "unwarranted by the facts" standard has no application. First, this standard applies only "... to the extent that the facts are subject to trial *de novo* by the reviewing court" [5 U.S.C. §706(2) (F)]. Unlike the "arbitrary and capricious" standard contained in Subsection A, this standard presupposes a review of the administrative action on the merits; in this case, that would mean a review of the wisdom of the Secretary's approval of the highway route and design. Such a review has long been precluded by this Court

[see *Berman v. Parker*, *supra*], and nothing in the Administrative Procedure Act changes this rule of law. Second, Petitioners have alleged no facts which would lead to an inference that the Secretary's approval was unwarranted by the facts and, therefore, summary judgment was proper. In order to have a trial *de novo* in any situation and avoid summary judgment, the Petitioners would have to allege facts showing the required dispute; this they have failed to do. Third, a party is entitled to a trial *de novo* (such entitlement being the statutory prerequisite to the application of this standard) only in situations where a "trial" or hearing was, or should have been, held in the first instance. The legislative history cited by Petitioners at page 35 of their typed brief [*Administrative Procedure Act, Legislative History*, S. Doc. No. 248, 79th Cong. 2d Sess. 39 (1944-46)] shows that Congress intended Subsections E and F to be correlative; this can only mean that Subsection E applies where a hearing is required within the agency by statute, and Subsection F applies where the particular statute does not require a hearing, but the type of agency action is one which would otherwise be subject to a hearing. Any other interpretation would lead to the conclusion that every agency action is subject to a trial *de novo*, from the decision of the President to activate the National Guard [the President not being within the exclusions in 5 U.S.C. §701(b)] to a determination that a certain crop of cranberries is contaminated.

Discretionary actions of executives, not subject to a hearing by statute or otherwise, are excluded from review by trial *de novo*. This is shown by the case cited by Petitioners, *First National Bank v. Saxon*, 352 F.2d 267 (4th Cir. 1965). In that case, the Court first decided that no hearing was required by statute on the question of the establishment of a branch bank, there contested by a competitor of the applicant. The Court next determined that the comptroller's approval was not a discretionary action within the exclusion in 5 U.S.C. §701 and, therefore, was subject to judicial review under §706. There being no hearing required, the

standard for review was found to be under Subsection F regarding a trial *de novo*. However, there are some important points about this case which distinguish it from the instant case. First, the *Bank* case involved a statute giving the comptroller a very different type of discretion, amounting almost to a ministerial duty. If he found that the applicant conformed to statutory requirements, he then had to issue the approval, while in the instant case the Secretary is called upon to use his discretion to determine if routes are "feasible" and "prudent" or designs are "possible." The comptroller was not to determine such widely discretionary factors — only if the proposal conformed to explicit state law. This indicates that Chapter 7 would not apply at all to the Secretary's approval here. Second, while no hearing was required by statute in the *Bank* case, it was a type of action normally taken after a hearing. The distinction is that a hearing is normal to administrative actions taken to determine the rights and liabilities of individuals in the private sector of society, and if no such hearing is statutorily required, then the facts needed to review judicially such a decision are supplied on trial *de novo*. [See Vol. 4 Davis, *Administrative Law Treatise*, §29.07 (1958), where Professor Davis states that the usual example of where a trial *de novo* is had is a review of a tax determination by the Internal Revenue Service.] On the other hand, where the administrative action is one concerning the plans and programs of government itself, no hearing is proper [see *Pacific States Box & Basket Co. v. White*, *supra*, at p. 186]. Finally, in the *Bank* case, the Court held that if, after the trial *de novo*, the trial court found "that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's. However, it can set aside such a determination if, in the light of the facts found by the Court, it concludes that the Comptroller has abused, exceeded or arbitrarily applied his discretion" [352 F.2d at p. 272]. Thus, the *Bank* case held, in the final analysis, that the only purpose of a trial *de novo* is to supply to the Court facts which would have been supplied by an

agency hearing, had one been held. Having those facts before it, the Court then decides the legality of the administrator's action on the "arbitrary and capricious" standard. Since in the present case the approval of the Secretary was a purely discretionary one, involving an action of government itself not subject to an agency hearing by statute or otherwise, 5 U.S.C. §706(2) (F) has no application. Not only is the Secretary's approval not the type of agency action where a hearing should be held, but the Petitioners have alleged no facts which indicate that anything necessary to a decision by this Court is missing from this record.

If Respondent is correct that the judicial review provisions of the Administrative Procedure Act do not apply to this case, judicial review upon proper basis is still available to Petitioners, in which case the question raised in this issue is relevant. For a judicial review of the discretionary approval of the Secretary of this highway project, there must be a charge, if not some factual allegation substantiating that charge, that the Secretary arbitrarily ignored the policy guidelines in the Parklands Statute, that he failed or refused to exercise his discretion, or that he acted beyond the scope of his powers [see *Schilling v. Rogers, supra*]. In such case, the Petitioners must indeed show that the Secretary was arbitrary in the manner of making his approval. Petitioners have not shown this; and thus, judicial review is not available to Petitioners in this instance, not because the law precludes it, but because Petitioners have failed to allege or prove the necessary basis to obtain the judicial review which the law does provide.

In conclusion, Respondent contends that under the Administrative Procedure Act, or otherwise, Petitioners must indeed show that the Secretary was arbitrary and capricious in order to obtain the relief sought.

ISSUE NUMBER FIVE

DOES THE RECORD CONTAIN DISPUTED ISSUES AS TO RELEVANT MATERIAL FACTS, SUCH THAT SUMMARY JUDGMENT IS NOT APPROPRIATE?

The District Court granted, and the Court of Appeals affirmed, Respondents' motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Petitioners raise the issue in this Court, as they did in the courts below, that the granting of summary judgment was not proper because there exist in the record disputed issues as to facts relevant and material to the questions before the Court. Respondent agrees with the following statement from the Court of Appeals' opinion, page 3, as to the law governing the determination of summary judgment in this case:

"When considering a motion for summary judgment a court is required to 'construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated.' *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir., 1962). If, after having done that, the court is able to say there is no genuine issue as to any material fact, summary judgment is appropriate.

"Although a court must be hesitant to grant summary judgment, cases challenging administrative action are ripe for summary judgment. See, e.g., *Todaro v. Pederson*, 205 F.Supp. 612, 613 (N.D. Ohio 1961), *affm'd* 305 F.2d 377 (6th Cir.), *cert. denied* 371 U.S. 891 (1962)."

Therefore, the only question regarding this issue is whether, in fact, such disputed issues exist. Respondent contends that there are no such disputed issues of material facts, and that summary judgment was proper.

It is somewhat unclear just what Petitioners contend to be the disputed items of fact. It seems well settled that the sole determinative issue remaining in this case (other than

the question of Petitioners' taking Bridwell's deposition, which is purely a legal question) is the only issue raised by Petitioners' complaint: was the Secretary's approval of the highway project sufficient to satisfy the requirements of the Parklands Statute without his issuing written findings as to the reasons and bases for that approval? Any so-called disputed issue of fact which could avoid summary judgment in this case must relate to this question, but no such factual issue exists, as all facts relative to this question are admitted. As shown above, Petitioners have admitted in their complaint and otherwise that the Secretary did, in fact, approve the route and design of the highway, and even admit that he conditioned his approval on certain changes in design intended to minimize harm to the Park. Respondents have admitted that in approving the highway, the Secretary issued no written findings of the type sought by Petitioners. Therefore, these being all of the facts relevant to this question, there exists no disputed issue of facts material to the prime question in the case.

Petitioners claim that some disputed issue of fact surrounds their claim that the Secretary was arbitrary, a claim not advanced in the pleadings. First, it appears that Petitioners claim that the admitted failure of the Secretary to issue findings was, itself, arbitrary. If this is the basis of Petitioners' argument about arbitrary action of the Secretary, it affords no grounds for a disputed issue of fact. If this Court holds, as Respondent contends, that no such findings are required by the Secretary, then his failure to issue written findings cannot be deemed arbitrary. If this Court holds that such findings are required, then that is sufficient grounds for relief (unless deemed harmless error), without determining if that failure was arbitrary. In any event, to be material, Petitioners' contention should be that the failure to issue findings was arbitrary, whatever the reason for the failure. However, Petitioners nowhere allege any facts, disputed or otherwise, which show any reason, arbitrary or otherwise, for the Secretary's failure to issue findings.

Aside from the failure to issue findings, Petitioners now contend that the approval of the project itself was arbitrary, although all we have in the record is this naked contention unclothed with substantiating facts. Petitioners further contend that the affidavit of Arlo I. Smith [App., p. 13], purporting to dispute the Swick affidavit [App., p. 27],³⁸ raises disputed issues of fact; but a review of the Smith affidavit shows this not to be the case. Mr. Smith first complains of certain procedural defects in the State informational hearings; these defects were found to be harmless by the lower courts, and this charge is not raised in this Court. Mr. Smith then states that the Secretary did not issue findings (which is admitted), and that, in Smith's opinion, there exist other feasible and prudent alternative routes. Mr. Smith does not claim that the Secretary failed to consider all alternative routes to see if any were feasible or prudent, or that the Secretary chose the route selected for an arbitrary reason, *e.g.*, that a relative owned land on that route. The blanket assertion by Mr. Smith or anyone else that, in his opinion, another route might be feasible and prudent is immaterial to any proper issue in this case. The question to be decided by this Court is not what route is the most, or only, feasible and prudent one, but whether the Secretary properly considered alternative routes in giving his approval to the route selected. Mr. Smith's affidavit is irrelevant to this issue and, therefore, raises no disputed issue of fact. The affidavit of Mr. Robert Conradt [App., p. 92], an engineer retained by Petitioners for this lawsuit, contains the same defects as the Smith affidavit, thereby raising no disputed issue of fact.

³⁸ Petitioners have claimed error because certain attachments to the Swick affidavit [App. p. 33] were not certified or authenticated. Petitioners made no timely objection in the District Court to the consideration of these documents by the Court, nor have Petitioners ever claimed that these documents are not true copies of what they purport to be. In fact, the Smith affidavit [App. p. 13] confirms the authenticity of these documents. The Court of Appeals quite effectively answered this contention of Petitioners at pages 6 and 7 of its opinion, and this appears no longer to be a question before this Court.

Petitioners emphasize Conradt's statement that, in his opinion, the fact that most of the right-of-way on either side of, and up to, the Park had been acquired and cleared, would not affect the selection of an alternate route. This does not raise a disputed issue of *fact*; it only shows that Conradt was of a different *opinion* than the Secretary on this point. Since the major part of this right-of-way was acquired before Parklands Statute was effective — that is, before the law required the approval here in dispute — there can be no question that it was proper and necessary for the Secretary to consider the state of right-of-way acquisition on the date of his approval. This is a very different case than *Citizens Committee for the Hudson Valley v. Volpe*, 302 F.Supp. 1083 (S.D.N.Y., 1969); *aff'd* 425 F.2d 97 (2d Cir., 1970); *Cert. Denied*, ____ U.S. ____ (Dec. 7, 1970). In the *Hudson Valley* case, the Corps of Engineers was planning to fill in the disputed segment of the Hudson River (thereby effectively placing the highway on the fill) without giving the Secretary of Transportation a chance to give or withhold any approval of the route.

Petitioners make much of the contention that Highway Administrator Bridwell³⁹ testified before a Congressional subcommittee [App., p. 65] that alternative routes existed at that time. This raises no material issue of fact, however. The Secretary has never contended that the route through the Park was the only route; he contends that when he approved this route, it was his decision that no other feasible and prudent routes existed. Congress delegated to the Secretary, and the Secretary alone, the discretion to make that determination. Petitioners' contentions that, at some time or times, someone said that alternative routes existed, or someone has an opinion that an alternative route is feasible or prudent, are irrelevant to the issue before the Court. To be so relevant, Petitioners must show by properly documented facts that the Secretary (not Mr. Smith or someone not in the decision-making position) believed that a

³⁹ Petitioners admit, through the Smith affidavit [App. p. 13], that Bridwell approved the present route on April 10, 1968.

feasible and prudent alternative existed, but that he, in giving his approval, arbitrarily disregarded that alternative. No such showing has been made by Petitioners and, therefore, there is no disputed issue on this point.

Petitioners next contend that a dispute exists as to the date of the Secretary's approval of the project. However, Petitioners alleged in their complaint that the project was finally approved in November 1969, and Respondents have agreed with this. In any event, even if such a dispute did exist, it would be relevant only if the Secretary relied on a defense that his approval predated the Parklands Statute. To this Respondent's knowledge, the Secretary has never taken such position, but has chosen to face head-on his responsibilities under the Parklands Statute.⁴⁰

Therefore, there exists no disputed issue of fact in any form relating to the approval by the Secretary of the highway route and design or the Secretary's manner of granting that approval. Boiled down to essentials, the only disputed issues of fact relate to the question of what is the best route and design for the highway. Petitioners disagree only with the wisdom of the Secretary's approval, saying that they would have chosen another route or selected a different design. This is undoubtedly caused by the special interests of the Petitioners in conservation — interests which are to be commended and which the Secretary certainly considered heavily—but interests which Petitioners give greater weight on the scales of decision than the Secretary is permitted to do. Unlike Petitioners, who are allowed, and even encouraged, by our social and political system, to advance only their own favorite interests (as they have done with praiseworthy skill and sincerity), the Secretary is charged by policy dictates of Congress and responsibilities of his position to

⁴⁰ The record shows that this route was approved before the effective date of the Parklands Statute, but that this approval was reviewed and reaffirmed after the Parklands Statute was passed. The final approval required certain changes in the design to minimize harm to the Park, not included in prior approvals [see Edgar W. Swick Affidavit, (App. pp. 7, 37)].

consider not only the interests of Petitioners, which he must surely share, but also the interests of efficient transportation, highway safety, pollution control, and a host of other equally important national concerns. Because he has the skill and facilities to study and balance these interests, Congress delegated to the Secretary the discretion to approve highway routes and designs. Petitioners would have this Court remove this discretion from the Secretary and place it in the Court itself, so that this Court would be placed in the position of selecting the route for the highway and planning its design. This is something that this Court has never done nor, Respondent thinks, should ever do [see *Berman v. Parker, supra*].

Since the only disputed issue of fact (in reality, a disputed decision of opinion, not fact) — the wisdom of the Secretary's decision — relates to an issue not properly before this Court, there exists no disputed issue as to material facts which would render summary judgment inappropriate. For these reasons, Respondent contends that the courts below properly granted and affirmed summary judgment for Respondents.

VII. CONCLUSION

Respondent, the Highway Commissioner of Tennessee, respectfully submits to the Court that the District Court and Court of appeals properly granted and affirmed summary judgment in favor of Respondents in this case. Therefore, Respondent prays that this Court affirm the decision of the Court of Appeals and dissolve the stay heretofore ordered in the case.

Respectfully submitted,
J. ALAN HANOVER
JAMES B. JALENAK

JANUARY 4, 1971

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1066

CITIZENS TO PRESERVE OVERTON PARK, INC., WILLIAM
DEUPREE, SR. AND SUNSHINE K. SNYDER, PETITIONERS

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, AND
CHARLES W. SPEIGHT, COMMISSIONER, TENNESSEE
DEPARTMENT OF HIGHWAYS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SECRETARY OF TRANSPORTATION

OPINIONS BELOW

The opinion of the district court (A. 165-174)¹ is reported at 309 F. Supp. 1189. The opinions of the court of appeals (A. 177-194) and its order denying a request for rehearing *en banc* and an application for stay (A. 195-198) are not yet reported.

JURISDICTION

The judgment of the court of appeals (A. 198) was entered on November 17, 1970. This Court, treating an

¹ "A" references are to the joint appendix filed with this Court.

application for stay as a petition for a writ of certiorari, granted the petition on December 7, 1970 (A. 199). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court should affirm the decision below that the Secretary made the necessary statutory determinations and was not required by law to make formal findings in support of his approval of the Overton Park project and should decline to consider the other issues raised here by petitioners.

2. Whether, in the alternative, this Court should remand the case to the district court to enable the Secretary of Transportation to introduce the entire administrative record upon which he based his decisions, so that the district court can review those decisions on the basis of that record.

3. Whether the district court erred in declining to order the deposition to be taken of an administrative official where the only purpose was to ascertain the basis for the administrative action taken.

4. Whether judicial review of agency action, which is not based on an administrative adjudication or on quasi-judicial administrative hearings, is limited by the Administrative Procedure Act to ascertaining whether the action taken was arbitrary, capricious, or an abuse of discretion.

STATUTES INVOLVED

Section 4(f) of the Department of Transportation Act of 1966 (80 Stat. 934, 49 U.S.C. (Supp. III) 1653(f)) provides:

The Secretary shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge or historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge or historic site resulting from such use.

Section 4(f), as amended in 1968 (82 Stat. 824, 49 U.S.C. (Supp. V) 1653(f)), and Section 138 of the Federal-Aid Highway Act (82 Stat. 823, 23 U.S.C. (Supp. V) 138), as added in 1968, which are virtually identical, provide:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secre-

tary shall not approve any program or project which requires the use of any publicly owned lands from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

STATEMENT

On December 2, 1969, petitioners commenced this action in the United States District Court for the District of Columbia, contending that the Secretary of Transportation had failed to make any findings under Section 138 of the Federal-Aid Highway Act (23 U.S.C. (Supp. V) 138)—and ~~in~~ a virtually identical provision in the Department of Transportation Act (49 U.S.C. (Supp. V) 1653(f))—in approving the disbursement of federal funds to the Tennessee Department of Public Highways to build a portion of Interstate Route I-40 through Overton Park, a 342-acre public park in Memphis, Tennessee. The suit sought to enjoin the Secretary from participating financially in any construction on that portion of the highway.

On motion of the Secretary, the action was transferred to the District Court for the Western District of Tennessee (A 80-81), where Commissioner Speight of the Tennessee Highway Department was added as a

defendant. The Secretary moved on affidavits, and attachments thereto, to dismiss the suit, and the district court, treating the motion as one for summary judgment pursuant to Rule 12(c), Fed. R. Civ. P., after hearing oral argument, granted summary judgment to respondents on February 6, 1970, and denied petitioners' motion for preliminary injunction. A divided court of appeals affirmed and denied a petition for rehearing *en banc* and an application for stay. This Court granted certiorari and stayed further construction on the Overton Park project pending the issuance of its judgment.

1. Interstate I-40 is being built as a cooperative federal-state venture under the Federal-Aid Highway Act, 23 U.S.C. 101, *et seq.*, which authorizes federal grants to the states of 90 per cent of highway costs to facilitate "the prompt and early completion of the National System of Interstate and Defense Highways" (23 U.S.C. 101, 120(c)). Under the statute, the states "to the greatest extent possible" select the different routes, subject to the approval of the Secretary of Transportation (23 U.S.C. 103(d)), and submit "such surveys, plans, specifications, and estimates * * * as the Secretary may require." 23 U.S.C. 106(a). Moreover, the Act requires that a state highway department submitting plans for a route "involving the bypassing of, or going through, any city, town, or village * * * shall certify to the Secretary that it has had public hearings * * * and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban

planning as has been promulgated by the community. * * *” 23 U.S.C. (Supp. V) 128(a).²

In October 1966, Congress enacted the Department of Transportation Act (49 U.S.C. 1651 *et seq.*), which became effective April 1, 1967 (Ex. Order 11340, 32 Fed. Reg. 5453; 80 Stat. 931 *et seq.*). Section 4(f) of the statute provided that the Secretary of Transportation, “after the effective date of this Act,” was precluded from approving “any program or project”³ requiring the use of public parkland “unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park * * *.” The provision was amended slightly in 1968 (82 Stat. 824), limiting its application, insofar as here relevant, to parklands “of national, State or local significance as determined by the Federal, State or local officials having jurisdiction thereof,” and otherwise conforming it to the precise language of newly added Section 138 of the Federal-Aid Highway Act (23 U.S.C. 138, 82 Stat. 823), effective August 23, 1968 (82 Stat. 836).

2. The determination that Interstate I-40 should pass through the northern part of Overton Park was originally made by the Bureau of Public Roads in 1956 (A. 27, 39),⁴ years before enactment of Section

² Procedural requirements for those hearings are set out in the Policy and Procedure Memorandum 20-8 of the Department of Transportation (23 C.F.R. 1, Appendix A).

³ The term “project,” as used in this context, means “an undertaking to construct a particular portion of a highway” (23 U.S.C. 101).

⁴ The Bureau of Public Roads, which administers the Federal-Aid Highway Program, was then a part of the Department of

4(f) and Section 138. The decision was reaffirmed, pursuant to 23 U.S.C. 105, by the Federal Highway Administrator on January 17, 1966 (A. 33, 34, 35), again before either provision in question had been enacted. On passage of the Department of Transportation Act in October 1966, however, with its restrictions on approvals by the Secretary, for federal grant purposes, of highway programs requiring the use of public parkland unless there exists "no feasible and prudent alternative" route and the program "includes all possible planning to minimize harm" to the park, a reexamination of the Overton Park project was undertaken by the Department (A. 23-25).⁵

As part of that further study, Federal Highway Administrator Bridwell conducted a public meeting in

Commerce. The Secretary of Commerce had delegated his authority to perform most of the functions vested in him under the Act to the Federal Highway Administrator, 25 Fed. Reg. 4162, 4166 (1960). Under the Department of Transportation Act, the Bureau of Public Roads was transferred to the new Department of Transportation (49 U.S.C. (Supp. V) 1655), and, while many functions of the Secretary of Transportation were delegated to the Federal Highway Administrator (49 C.F.R. 1.4), his responsibility under the provisions involved here was retained (49 C.F.R. 1.6).

⁵ Federal Highway Administrator Bridwell, testifying at the hearings before the Subcommittee on Roads of the Senate Committee on Public Works in May 1968, made specific reference to the Overton Park project, prefacing his discussion with this statement (A. 65): "There have been plans for many years to build an interstate highway, interstate Route 40, through the park. This culminated recently in considerable controversy over whether the park could or should be used for an interstate highway. Once again this 4(f) portion of the Department of Transportation Act came into play. It, in effect, required us to do the same type of thing that we did in New Orleans, go back and look at, is there another feasible and prudent location."

Memphis on February 14, 1968, concerning the location of the route (A. 137). In addition, on April 3, 1968, he met with the Memphis City Council to discuss alternatives "on almost any conceivable line" that "engineeringly * * * was feasible" (A. 65); however, no information was given on various cost factors since they were not to enter into the Council's consideration (A. 65).⁶ Essentially, attention was focused on four routes: "Mr. Bridwell used maps, aerial photographs and other graphic material to explain the effects of alignments north of the Park, south of the Park, along the north edge of the Park and the original route proposed by the Tennessee Department of Highways" (A. 24-25).⁷

After that meeting, the City Council determined, on the basis of the "considerable information and data" presented by the Federal Government and the Department of Highways of the State of Tennessee, that "the route presently designed * * * through Overton Park is the feasible and prudent location for said route" (A. 26). Two weeks later, Secretary of Transportation Boyd approved the proposed alignment through the northern part of the park (A. 36).⁸ He

⁶ While cost was a relevant factor for consideration by the federal government, since it would be contributing to the state 90 per cent of the highway costs, this factor was not deemed relevant to the City Council's deliberations primarily because "Memphis was not involved in the cost of the [the highway] one way or the other" (A. 65).

⁷ The City Council was told (A. 65) "to concentrate upon the conflicting set of community values that were inherent in each one of the alternatives."

⁸ This approval under Section 4(f) of the Department of Transportation Act, occurred on April 19, 1968, over four

then wrote a lengthy letter to the director of Citizens to Preserve Overton Park (A. 23-25), explaining the thorough examination of alternative routes and stating that "Memphis and Overton Park have received perhaps more consideration than have Baltimore and Washington," that now "the decision has been made on the specific alignment for the route," and that he had "asked Mr. Bridwell to develop a number of specific design alternatives in order to minimize damage to the park and its facilities."

Subsequent to Secretary Boyd's approval, the State Highway Department, which had been authorized on May 29, 1967 (A. 137) to purchase the right-of-way through Memphis for Interstate I-40, and had commenced doing so in the areas not immediately adjacent to the park (A. 28), acquired the remaining parcels of land in the right-of-way and proceeded to clear the last 5 miles leading to the eastern edge of Overton Park and the last 2.5 miles on the west side.⁹ The State of Tennessee also entered into negotiations with the City of Memphis for the strip of parkland along the chosen route and, in September 1969, the state was deeded the 26 acres involved for \$2,000,000 (A. 30).

months before enactment of Section 138 of the Federal-Aid Highway Act. The "first ruling of the Secretary under [Section 138] of the Federal-Aid Highway Act of 1968," as pointed out in the government's brief in opposition to certiorari in *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, et al.* (No. 1101, this Term, certiorari denied, December 21, 1970), was not made until September 23, 1968.

⁹ At the present time "ninety-nine percent of the approximately 2,200 people formerly living there have been displaced, and seventy-five percent of the buildings demolished" (A. 28).

By local ordinance, the city was required to invest this sum in other parkland; it already has spent \$1,000,000 to acquire a 160-acre park, which includes a golf course, and expects to use the remainder to buy separate local park areas totalling 140 acres (A. 30, 41-42, 120-121).¹⁰

On November 5, 1969, after public hearings had been held by the Tennessee Highway Department (A. 30-32, 137) on the design of the highway pursuant to 23 U.S.C. 128, Secretary of Transportation Volpe announced in a press release (A. 37) that "[t]he 'hold' on the project has been lifted after the State agreed to adjust the grade line of the depressed freeway to a point as low as possible."¹¹ The press release further stated: "The state also has agreed to take all steps possible to minimize the harm to the park resulting from the highway" (A. 38).¹² It also pointed out (A. 37):

¹⁰ An additional \$209,200 paid to the city by the state for construction of certain parking areas and the moving of a wooden pavilion and various utilities has been spent to improve the park's zoo (A. 120).

¹¹ Petitioners concede (Pet. Br. 10) that Secretary Volpe's approval went only to the design of the then determined route through the park. This action was the first taken by the Secretary of Transportation on this project after enactment of Section 138 of the Federal-Aid Highway Act.

¹² That the design of the Overton Park route was studied to determine its conformance with the statutory standard set forth in both Section 4(f) and Section 138 (see A. 137-139) is reflected most vividly in a letter dated June 5, 1969, from Assistant Secretary for Urban Systems and Environment Brame to the Executive Vice President of the National Audubon Society (see Aff. of Callison, dated January 23, 1970, Ex. F): "This is one of the several controversial road projects inherited by the Volpe Administration when it took over the De-

The plan for Overton Park is the most reasonable now open to us and is designed to do minimum damage to the park. The options of this Administration were few, mainly because the route of the highway had previously been determined.

3. The approved segment of Interstate I-40 is to follow an existing non-access bus road (A. 130) that presently runs in an east-west direction through the northern part of Overton Park and is, including the paved area and the right-of-way on either side, approximately 40-50 feet wide (A. 130).¹³ Immediately north of this bus road, starting at the western edge of the park and continuing eastward for about two-thirds the distance of the road, there is now a chain-link fence (A. 116), which separates the zoo from the rest of the park.¹⁴ The remaining area north of the

partment. We are at the present time energetically exploring all possibilities open to this office to assure the best possible design that is in keeping with the requirements laid upon the Secretary by Section 4(f) of the Transportation Act."

¹³ As the highway enters the park from the east, it will be approximately 425 feet wide due to the proximity of an auxiliary access ramp not in the park area; it will then taper abruptly to a width of approximately 250 feet and remain at that width until it leaves the park (A. 58). Present plans call for a 40-foot median strip, both for safety and aesthetic purposes, to run the entire length of the park (A. 29-30, 41).

¹⁴ At the present time, the city, primarily with a portion of the funds received from the state in the purchase of 26 acres in Overton Park, is expanding zoo facilities in an easterly direction, in an area of the park still remaining north of the existing bus road (A. 114). Except for a portion of one parking lot, the entire zoo area will be untouched by construction of Interstate I-40 (A. 29, 115, 120, 133).

road is composed primarily of zoo parking lots which the city expects to improve and expand.¹⁵

Overton Park, then, is essentially to the south of the existing bus road. This is where the nine-hole municipal golf course is located, and the outdoor theatre, the art academy, the lake, the nature trails, the bridle path, and the picnic grounds (A. 115-116, 120). This entire area will remain virtually untouched (A. 29, 116, 120).¹⁶

Construction of the highway will involve taking 26 acres—or less than 8 percent—of the 342 acres of parkland (A. 29, 117). While it will necessitate cutting down some 12 acres of trees, approximately 150 acres of unimproved wooded area will not be affected (A. 112).

¹⁵ The expansion program for zoo facilities being undertaken by the city (A. 114, 121) is a clear indication that more than the estimated 11½ million people who visited the zoo in 1967 (A. 15) are expected after the highway is completed.

¹⁶ There is thus little basis for petitioners' bald assertion (Pet. Br. 7) that no consideration was given to the millions of people who use Overton Park annually. Similarly, the contention (Pet. Br. 7) that "the present route will displace or affect more people than the alternative to the north of the park and nearly as many as that to the south" is without merit. The north route, while displacing less residents (though destroying more residential units), would require (A. 69, 145) destruction of almost 100 more commercial and industrial units, an additional church, and 3 more schools, including Southwestern University and the largest high school in Memphis (no estimate of "people affected" by the taking of these schools is reflected in the statistics on which petitioners (pp. 7-8, n. 5) rely). The alternative route south of the park (A. 69, 145) would require displacing approximately 800 more residents (destroying over 350 more residential units), leveling 16 additional commercial and industrial units, taking two more schools and a hospital and home for the aged.

The new roadway is to be depressed below ground level so that the traffic on the road will not be visible to users of the park (A. 30, 40-41, 138-139);¹⁷ in one area, however, where the highway crosses a creek, it will not be depressed, since to do so would cause serious drainage problems (A. 123-125).¹⁸

SUMMARY OF ARGUMENT

I

In this case, petitioners challenge the approval by the Secretary of Transportation of the route location and route design of the Overton Park segment of Interstate I-40 on the ground that the Secretary did not make any formal findings in the language of Section 4(f) of the Department of Transportation Act and the identical wording found in Section 138 of the Federal-Aid Highway Act. Those provisions vest in the Secretary the ultimate authority to determine whether there exist any "feasible and prudent alternative to the use" of parkland for highway construction and, if not, whether the proposed highway

¹⁷ Both a bored^πtunnel and a cut-and-cover tunnel were considered (A. 28, 40) and rejected. The cost of the former would have been about \$107,000,000; the cost of the latter would have been \$41,500,000 (A. 28, 40). This compares with the \$3,500,000 figure for the depressed route. Moreover, both alternatives presented difficult problems of construction, drainage, concentrated air pollution at ventilation points, and traffic safety (A. 28, 40). Further, the bored^πtunnel would have had to be at least 20 feet deep to avoid tap roots, and even then there was a serious risk that the trees would not survive (A. 40). The cut-and-cover tunnel would have destroyed the park vegetation to the same extent as the depressed highway (A. 40).

¹⁸ A proposal to depress the highway in this area by using a siphon pump was fully studied, and rejected (A. 124-125).

project "includes all possible planning to minimize harm to such park." However, neither the Department of Transportation Act nor the Federal-Aid Highway Act contains a formal requirement that the Secretary issue written findings in support of his determinations under the statutory standard. Moreover, the provisions of the Administrative Procedure Act that require written findings in support of action taken by an administrative agency have no application to the instant case. Since it is clear on the record before this Court that each Secretary did in fact make the proper determinations under the statute, the decision below should be affirmed and this Court should decline to consider whether the approvals were arbitrary, capricious or an abuse of discretion; that issue was never raised by the pleadings.

II

However, if this Court is of the view that the question going to the merits of the Secretary's determinations has been properly raised by petitioners, the proper disposition of this case is to remand it to the district court to enable the Secretary of Transportation to introduce the entire administrative record upon which his decisions, and those of his predecessor, were based, and thus permit the district court to decide on the summary judgment motion whether the action taken was arbitrary and capricious on the basis of a review of that record. While, in our view, the affidavits, and attachments thereto, fully support the decision below on this issue, we recognize that such documentation may be characterized as just the sort of

"counsel's *post hoc* rationalizations" on which this Court has expressed a particular reluctance to rely. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169. By providing the district court this opportunity to subject the entire administrative record to judicial scrutiny, "[t]he administrative process will best be vindicated" and the likelihood of propelling "the courts into the domain which Congress has set aside exclusively for the administrative agency" best avoided. *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 197.

III

The courts below committed no error in refusing to permit petitioners to take the deposition of past Federal Highway Administrator Bridwell, a man not vested with the ultimate responsibility to make the statutory determinations prescribed in Section 4(f) and Section 138 and thus in no position to testify whether in fact such determinations had been made. Manifestly, the purpose for noticing Bridwell's deposition was, as petitioners originally indicated, to "ascertain the basis, if any, for the Secretary's approval." This Court has long recognized that interrogation of administrative officials, including the Secretary himself, in order to "probe the mental processes" is impermissible. *United States v. Morgan*, 313 U.S. 409, 422. That principle has particular application to the present case where the indication on the record before this Court that the Secretary in fact made the requisite statutory determinations is no less clear than it was in *Morgan*. Significantly, there is no claim here

of bad faith or undue political pressure which might warrant pre-trial interrogation of an administrative official concerning some specific personal charge against him.

IV

There remains only the question of what reviewing standard should be applied by the courts in examining action by the Secretary of Transportation under Section 4(f) and Section 138. Petitioners argue here, for the first time, that such administrative decisions can be upheld only if supported by substantial evidence. However, the "substantial evidence" standard is, by the express terms of the Administrative Procedure Act, as revised (5 U.S.C. (Supp. V) 706(2)(E)), to be used only in cases where the court is reviewing action by an agency taken pursuant to the rule-making provisions of the Act, or agency action based on an adjudicatory hearing as required by sections 556 and 557 of the Act, or an agency determination subject to review "on the record of an agency hearing provided by statute." The instant case comes within none of the enumerated categories. Accordingly, the proper reviewing standard is the one applied by both courts below and consistently followed by other courts in litigation of this type. The judicial task is to ascertain from the administrative record only whether the decision to route Interstate I-40 through Overton Park as a depressed highway was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. (Supp. V) 706(2)(A)).

ARGUMENT

I

THIS COURT SHOULD AFFIRM THE DECISION BELOW THAT THE SECRETARY MADE THE NECESSARY STATUTORY DETERMINATIONS AND WAS NOT REQUIRED TO MAKE FORMAL FINDINGS IN SUPPORT OF HIS APPROVAL OF THE OVERTON PARK PROJECT, AND SHOULD DECLINE TO CONSIDER THE OTHER ISSUES RAISED HERE BY PETITIONERS

Petitioners commenced this action in the United States District Court for the District of Columbia (see pp. 4-5 *supra*), charging, insofar as here relevant,¹⁹ only that (A. 11-12, 89-90):

Neither Defendant Volpe nor any previous Secretary of Transportation has made any finding that there is no feasible and prudent alternative to the use of [Overton Park]. Defendant Volpe has made no finding that the program for the Project includes all possible planning to minimize harm to such park and recreation areas. In the absence of such findings, his approval of the Project has violated 23 U.S.C. § 138 and 49 U.S.C. § 1653(f).

The statutory provisions in question preclude the Secretary of Transportation from approving, for federal grant purposes, any highway "program or project" (*supra* n. 3) requiring the use of public parkland of national, state or local significance "unless (1) there is no feasible and prudent alternative to the use of such land and (2) such program includes all possi-

¹⁹ Petitioners also alleged procedural errors in the public hearings held by the Tennessee Highway Department pursuant to 23 U.S.C. 128. Both courts below rejected this argument (A. 167-170, 187-188), and petitioners have not raised it again here.

ble planning to minimize harm to such park.” 23 U.S.C. 138; 49 U.S.C. 1653(f). The responsibility for applying this standard rests, in the final analysis, solely with the Secretary, though he is instructed, in reaching his decision, too “cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States * * *” (*ibid.*).

1. A review of the legislative history of both Section 4(f) and Section 138 reflects that, while Congress intended the Secretary to give full and complete consideration to any conceivable alternative route under the statutory standard, it also meant for him to have a wide latitude of discretion in his application of that standard. When the proposal was made in the House in 1968 to add to the Federal-Aid Highway Act a provision similar to Section 4(f) of the Department of Transportation Act of 1966,²⁰ it was recommended that the statutory language in the new provision be changed after the word “unless” to read: “such program or project includes all possible planning, including consideration of alternatives to the use of such land, to minimize any harm to such park * * *” H.R. No. 17134, § 17, 90th Cong., 2d Sess. (1968), 114 Cong. Rec. 19393. The amendment passed the House,²¹ despite

²⁰ There was very little discussion of this provision in either house in 1966. See 112 Cong. Rec. 14073, 26565; S. Rep. No. 1659, 89th Cong., 2d Sess. 5-6 (1966). It is noteworthy, however, that Section 4(f) of the original Senate bill, which ultimately became the law, was amended in conference to add the words “and prudent” after the word “feasible.” H. Conf. Rep. No. 2236, 89th Cong. 2d. Sess. 25 (1966).

²¹ The House amendment also amended Section 4(f) of the Department of Transportation Act of 1966 to make that pro-

strong criticism that the standard it set forth was too vague (114 Cong. Rec. 19409):

What does "consideration of alternatives" mean? How much consideration to what kinds of alternatives? The amendment might permit a highway engineer to glance at an alternative to a proposed highway—an alternative that is more costly but does not slice through a park—and reject the alternative because use of the parkland will keep down his acquisition costs. Section 17 is totally inconsistent with the intent of Congress to preserve and enhance this Nation's countryside by providing an explicit standard to guide the Secretary of Transportation's decision. It should, therefore, be rejected. [Rep. McCarthy]

However, the view expressed above prevailed in the Senate (114 Cong. Rec. 19529-19530; Sen. Jackson), and that body reported out a bill (S. 3418) which tracked the "no feasible and prudent alternative" language in Section 4(f) of the 1966 Act. 114 Cong. Rec. 19531. This bill was the one adopted by the Conference Committee (H. Conf. Rep. No. 1779, 90th Cong., 2d Sess. 32) and eventually enacted into law. 23 U.S.C. 138; 49 U.S.C. (Supp V) 1653(f).

It is in this light that the colloquy among Senators Cooper, Randolph, and Jackson, on which petitioners place such heavy reliance (Pet. Br. pp. 7a-9a), must be read. Manifestly, Congress intended the Secretary to have "no discretion" (114 Cong. Rec. 24033; Sen. Cooper) concerning *whether* full and complete con-

vision conform with the proposed language for Section 138. H.R. 17134, § 18, 90th Cong., 2d Sess. (1968).

sideration need be given to all alternatives. Cf. *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 612. On this point, as Senator Randolph observes (114 Cong. Rec. 24033), the "interpretation of the House" did not prevail. Rather, the language enacted provided a clear and firm barrier. In the words of Senator Cooper (114 Cong. Rec. 24033), it "prohibits any intrusion upon or invasion of these [park] lands or areas if one of these bodies finds it is of National, State, or local significance, and the highway cannot be built, unless there is no feasible and prudent alternative to doing so." Thus, in most precise terms, Congress provided "an explicit standard to guide the Secretary of Transportation's decisions" (114 Cong. Rec. 19409; Rep. McCarthy), vesting in him "the authority * * * to protect these irreplaceable lands and sites from the cynical intrusions of the insensitive highway lobby" (114 Cong. Rec. 24036-24037; Sen. Yarborough). Indeed, under the statute, "even though local authorities * * * should decide the highway would not violate the recreational area or the public park area, the Secretary would nevertheless retain the right to veto the action" (114 Cong. Rec. 20433; Senator Jackson).

In exercising his statutory responsibility, the Secretary has the delicate task of balancing, on the one hand, the overall detriment to the community by use of the parkland—weighing such factors as the extent to which the community uses the area as parkland, the actual damage to the park, the availability of other parkland in the community, and other factors—and, on the other hand, the harsh impact on people due to dislocation and displacement if the parkland is not

used. As stated in the report of the Senate Public Works Committee, in approving the bill that became the present law (S. Rep. No. 1340, 90th Cong., 2d Sess. 19), and reiterated on the floor of the Senate by the committee chairman (114 Cong. Rec. 19530; Sen. Randolph):

The committee would further emphasize that while the areas sought to be protected by section 4(f) of the Department of Transportation Act and section 138 of title 23 are important, there are other high priority items which must also be weighed in the balance. The committee is extremely concerned that the highway program be carried out in such a manner as to reduce in all instances the harsh impact on people which results from the dislocation and displacement by reason of highway construction. Therefore, the use of park lands properly protected and with damage minimized by the most sophisticated construction techniques is to be preferred to the movements of large numbers of people.

On this point, the House was in full agreement; in the report of the House Committee on Public Works (H. Rep. No. 1584, 90th Cong., 2d Sess. 12), there appears the following clear statement of intent:

Parklands and historic sites, as well as the other kinds of areas listed in these sections, have very real value; if that were not so, neither section of law would exist. No rational person would suggest, however, that that value is the only one to be considered in a judgment as to the best public interest. In weighing alternatives for highway location, equal consideration must be given to other factors—to whether

people will be displaced; to whether existing communities will be disrupted; to whether the established demand for adequate transportation facilities for people, goods, and services will be met; and to the preferences of the people of the area involved. Preservation for use is sound conservation philosophy, and it is in that perspective that both section 138 and section 4(f) should be administered.

There is no better evidence of the complete unanimity of both houses on this point than the report of the Conference Committee which reported out the compromise bill that was ultimately enacted. There, it was stated that (H. Conf. Rep. No. 1799, 90th Cong., 2d Sess. 32):

This amendment of both relevant sections of law is intended to make it unmistakably clear that *neither* section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that clearly enunciated local preferences should be overruled on the basis of this authority.

2. In the instant case, the record presently before this Court reflects that the Secretary of Transportation, both at the time Secretary Boyd approved the route location in April 1968, and at the time Secretary Volpe approved the route design in November 1969,

made the determinations required of him under Section 4(f) and Section 138.

After enactment of Section 4(f) in 1966, Secretary Boyd, though perhaps technically not required to do so (see *Triangle Improvement Council v. Ritchie*, 314 F. Supp. 20 (S.D.W.Va.), affirmed, 429 F. 2d 423, (C.A. 4), certiorari granted, December 21, 1970 (No. 712, this Term)), re-examined the Overton Park project to determine whether there existed any feasible and prudent alternatives (n. 5, *supra*). He sent Federal Highway Administrator Bridwell to Memphis to discuss the route location with the Memphis City Council. After that discussion, the City Council, without regard to cost factors (*supra*, p. 8), approved the designated route through the park as the "feasible and prudent" location for the highway. Only then did Secretary Boyd approve the route, in an announcement stating that "the action follows an April 5 resolution by the Memphis City Council which found the park route 'feasible and prudent' " (A. 36).

The suggestion by petitioners that the Secretary was unaware of the statutory standard at the time he acted is refuted not only by the testimony of Federal Highway Administrator Bridwell before the Senate Subcommittee on Roads (n. 5, *supra*) and by the language of the April 19, 1968 press release (A. 36), but also by two letters the Secretary wrote shortly thereafter, the first to the Director of Citizens to Preserve Overton Park, explaining the careful consideration given to alternate routes (A. 23-25), and the sec-

ond to Speaker of the House McCormack, quoting the statute verbatim and opposing any amendment to the language of Section 4(f).²² 114 Cong. Rec. 19530. It is equally clear that Secretary Volpe, at the time he approved the design of the highway (see n. 11, *supra*), was cognizant of the statutory standard. Indeed, his approval was conditioned explicitly on an agreement by the state "to take all steps possible to minimize the harm to the park resulting from the highway" (A. 38).

3. Petitioners contend, however, that the Secretaries' approvals were unlawful because unsupported by formal findings in the language of the statute. However, there is no requirement for such findings in the Department of Transportation Act; nor did Congress include such a provision in the Federal-Aid Highway Act.²³ Moreover, the Administrative Procedure Act (formerly 5 U.S.C. 1001 *et seq.*), expressly excludes grants-in-aid from its rule-making provision (5 U.S.C.

²² In that letter, Secretary Boyd stated: "The Department is aware of no problems which have arisen in the course of administering the present language * * *."

²³ A separate provision of this Act (23 U.S.C. 109) precludes the Secretary from approving "plans and specifications for proposed projects on any Federal-aid system" unless there is provision for a facility "(1) that will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives and to conform to the particular needs of each locality." This provision has consistently been interpreted by the Department as not requiring formal written findings in support of the Secretary's approval.

(Supp. V) 553(a)(2)),²⁴ and requires written findings and conclusions only in "case[s] of adjudication required by statute to be determined on the record after opportunity for an agency hearing" (5 U.S.C. 554(a)). The Secretary's determination of the proper route and design for a highway cannot reasonably be considered such an "adjudication." See *Gart v. Cole*, 263 F. 2d 244 (C.A. 2); *South Suburban Safeway Lines v. City of Chicago*, 416 F. 2d 535 (C.A. 7). Nor can the applicable statutes be construed as instructing the Secretary to hold an "agency hearing" before approving an interstate route. Cf. *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F. 2d 624, 627-631 (C.A.D.C.), certiorari denied, 385 U.S. 843; *Borden Company v. Freeman, et al.*, 256 F. Supp. 592, 600-602 (D.N.J.). Rather, public hearings of a non-adjudicatory, quasi-legislative nature are to be conducted by state officials (23 U.S.C. 128), and the transcripts forwarded to the Secretary for his consideration, along with Department studies (A. 39-42, 143-148), reports by independent firms (A. 101-111) and all other documents and exhibits that together comprise the administrative record (see n. 31, *infra*).²⁵

²⁴ By the terms of this section, the rule-making provision has no application where there is involved "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." This case involves both "public property" and "grants" within the meaning of the above language.

²⁵ The legislative history indicates that the Secretary is not to limit his consideration to information received from state and local sources, but is to go beyond this information and reach his own independent decision on the basis of the entire record before him. 114 Cong. Rec. 24036-24037.

This Court has traditionally demonstrated a marked reluctance to insist on formal findings where none are legislatively commanded. *United States v. Louisiana*, 290 U.S. 70, 80; *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186; *Thompson v. Consolidated Gas Co.*, 300 U.S. 55, 69; *United States v. Rock Royal Co-op*, 307 U.S. 533, 567-568; *American Trucking Association v. United States*, 344 U.S. 298, 320; but see *City of Yonkers v. United States*, 320 U.S. 685.²⁶ Indeed, when it has required findings, the reason generally given is that the case, as it came before the Court, rested on conflicting inferences of fact unresolved by the administrative record. See, e.g., *Baltimore & Ohio R.R. Co. v. Aberdeen & R.R. Co.*, 393 U.S. 87, 92; *Florida v. United States*, 282 U.S. 194, 214-215; *United States v. Baltimore & Ohio R.R. Co.*, 293 U.S. 454, 463-464; *City of Yonkers v. United States*, 320 U.S. 685, 695 (Frankfurter, J., dissenting). That rationale has no application to the instant case where, on the question whether the Secretary in fact made the statutory determinations, there exist no conflicting inferences of fact.

Moreover, even if a contrary inference could be drawn from the present record before this Court, those decisions indicate (consistent with our position if this Court should feel constrained to reach the

²⁶ The *City of Yonkers* case involved a failure of the Interstate Commerce Commission to include in its order an explicit finding of jurisdiction, even though no party had raised a question of jurisdiction in proceedings before the Commission. Since agency findings of "jurisdictional facts" are subject to special requirements that do not apply to agency findings of other facts, the *Yonkers* decision represents nothing more than an exception to the general rule enunciated in the other cases. See generally, Davis *Administrative Law* § 164 (1951).

other issues urged here by petitioners; see pp. 30-35, *infra*) that this action should be remanded to the district court to permit the Secretary to introduce the entire administrative record on which his decisions were based. For the Court now to require formal findings where none are called for by statute, without first subjecting the administrative record to judicial scrutiny, would, in our view, be inappropriate.

In so stating, we are not unmindful of the new regulation issued by the Department of Transportation on October 7, 1970 (DOT Order 5610.1), which requires the Secretary to make formal findings in the language of the statute in support of all approvals under Section 4(f) of the Department of Transportation Act. While that regulation will guarantee a comprehensive statement of reasons in future cases, it was not intended to have retrospective application.²⁷ Even if it must be considered, under the authority of *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 281-282, as the law in effect at the time this Court hands down its decision, there are compelling reasons that it not be held to apply here.²⁸

Secretary Boyd's approval of the route location in April 1968²⁹ marked the beginning of serious negotiations between the State of Tennessee and the City of

²⁷ The regulation was promulgated pursuant to Ex. Order 11514, dated March 5, 1970, which instructs all Federal agencies to initiate procedures needed to direct their policies and programs so as to meet national environmental goals.

²⁸ This Court acknowledged in *Thorpe* that it did not there intend to lay down an absolute rule (393 U.S. at 282).

²⁹ Petitioners chose not to commence this litigation until December 2, 1969 (see n. 33, *infra*).

Memphis for the purchase of the 26 acre strip of parkland to be used for Interstate I-40. This land was acquired in September 1969, for \$2,000,000 (*supra*, p. 9), a portion of which has already been invested by the city in additional parkland (*supra*, p. 10). Similarly, the state, subsequent to Secretary Boyd's approval, proceeded to acquire and clear the remaining land in the right-of-way up to either edge of the park; some 2,200 persons have now been moved out of this area and their homes have been destroyed (*supra*, p. 9). Thus, unlike the *Thorpe* case where there had been no change of circumstances (393 U.S. 283), the situation confronting the Department at the time it studied the Overton Park project in 1967-68 has changed drastically.

Moreover, there has been no suggestion by petitioners in this case that either Secretary Boyd or Secretary Volpe acted in bad faith, or as a result of political pressure, or because of some other improper or illegal reason prejudicial to petitioners (*infra*, pp. 37-38). We do not, then, have here an analogue to *Thorpe*, where the evidence indicated that the tenant's eviction was for reasons that were not only improper, but indeed unconstitutional (393 U.S. 282-283). Instead, the evidence before this Court all points to but one conclusion (*supra*, pp. 23-24): that each Secretary approved the Overton Park project because he had determined in accordance with the requisite statutory standard that there existed "no feasible and prudent alternatives to the use of such land" and that the project included "all possible planning to minimize harm" to the park.

Plainly, then, this case does not present a situation to which *Thorpe* applies (393 U.S. at 283). There is not here any evidence of a substantive violation of the new regulation—*i.e.*, a failure of the Secretary to make the findings required by the statutes—but merely evidence of a failure to adhere to certain formalities the Department will henceforth follow. In these circumstances, insistence on such formalism would, in the words of Mr. Justice Frankfurter, be tantamount to “marching the king’s men up the hill and then marching them down again.” *City of Yonkers v. United States*, 320 U.S. 685, 694 (dissenting opinion).

Thus, even if it should be held, for some reason, that the new regulation applies here, the failure to have made formal findings would not be prejudicial on the facts of this case (see 5 U.S.C. 706). This Court has traditionally expressed concern that agency action not be reversed “when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached.” *Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*, 377 U.S. 235, 248. In our view, that principle should control here, and the judgments below should be affirmed.

Since the other major issue now before this Court—whether the action taken by the Secretary of Transportation on the Overton Park project was arbitrary, capricious, or an abuse of discretion—was never raised in the pleadings (*supra*, p. 17), it would be appropriate for the Court to dispose of the case on the

"findings" issue alone, without reaching the other question. If, however, the Court should conclude that this other question is in the case,³⁰ it is our view, as reflected in our motion to remand filed on December 21, 1970, that the case should be returned to the district court to enable the Secretary to introduce the entire administrative record on which his decisions were based,³¹ and to afford the district court an opportunity to decide, on summary judgment motion, whether either Secretary's action was arbitrary and capricious (see *infra*, pp. 39-42). We now discuss the latter alternative.

II

IN THE ALTERNATIVE, THIS COURT SHOULD REMAND THE CASE TO THE DISTRICT COURT TO ENABLE THE SECRETARY OF TRANSPORTATION TO INTRODUCE THE ENTIRE ADMINISTRATIVE RECORD UPON WHICH HE BASED HIS DECISIONS, SO THAT THE DISTRICT COURT CAN REVIEW THOSE DECISIONS ON THE BASIS OF THAT RECORD

It has been generally recognized, following this Court's first decision in *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87, that, when

³⁰ The issue was raised and considered during oral argument before the district court (see p. 39, *infra*). See Rule 15(b), Fed.R. Civ. P.

³¹ There is no disagreement here as to what constitutes the "administrative record." It is, as petitioners point out (Pet. Br. 30), all "information which the Secretary had before him when he made the decisions under review." As observed in *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650, 662 (S.D.N.Y.), a case strikingly similar to the present action, "[i]t is on that record that the Administrator acted and on

reviewable by the courts,³² "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." This does not mean "appellate counsel's *post hoc* rationalizations for [the] agency action," *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169; rather, as this Court ruled in the second *Chenery* case (332 U.S. 194, 196), a "reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." It must, under the Administrative Procedure Act (5 U.S.C. 706), reach its decision on the basis of the "whole record" compiled by the agency, or such portions thereof as may be cited by any party (see pp. 41-42 *infra*).

In the instant case, the courts below determined, without recourse to the administrative record on which the action was founded, that the approval by the Secretary of Transportation of the route and design of the Overton Park project was neither arbitrary, capricious, nor an abuse of discretion. It is our position that that determination is correct and is fully sup-

that record that his action must be judged." And see *Western Addition Community Organization v. Weaver*, 294 F. Supp. 433, 437 (N.D. Calif.). The Department of Transportation has advised us that the "administrative record" on the Overton Park project consists of one carton (approximately file-drawer size) of documents, all of which have heretofore been examined by counsel for petitioners.

³² Action by the Secretary of Transportation under the provisions here in question is subject to judicial review in accordance with the Administrative Procedure Act. See 49 U.S.C. 1655(h).

ported by the affidavits, and attachments thereto, introduced on the government's motion for summary judgment.³³

We recognize, however, that the supporting documentation might be characterized as the sort of "counsel's *post hoc* rationalizations" on which this Court has consistently expressed a reluctance to rely. See,

³³ In opposing the application for stay and the petition for a writ of certiorari, it was our position that the issues presented were not of sufficient importance to warrant a grant of certiorari (Gov't Mem. in Opp., No. 1066, this Term). The sworn affidavits before the Court reflect the careful consideration given to "feasible and prudent alternatives" and to "all possible planning to minimize harm" to Overton Park. Moreover, they demonstrate that both Secretary Boyd and Secretary Volpe were fully aware of the statutory standard at the time they gave their approvals and that they acted in accordance with that standard (*supra*, pp. 23-24). Finally, they show that petitioners, though apprised of the fact that Interstate I-40 was to pass through the northern part of Overton Park as early as June 1968 (A. 23-25), waited until December 1969 to commence this suit, after the state had purchased the parkland to be affected and had acquired and cleared the right-of-way to the edge of the park on either side. Petitioners presented no factual evidence to support their bald assertion that the Secretary of Transportation acted improperly; they have not yet suggested a single route which can be shown to be a "feasible and prudent" alternative (A. 109-111); they give no factual basis for their claim that the approved design does not "include all possible planning to minimize harm" to the park. In these circumstances, there seemed no occasion for this Court to review a possible procedural error by the trial court, for the stated purpose, not to prevent construction of the highway through Overton Park, but to gain a remand and further delay of that construction. However, since at least four members of the Court did not agree, we think it important that a review of the merits be on the basis of the entire administrative record in order to avoid further delay and needless additional litigation of this action.

e.g., *National Labor Relations Board v. Metropolitan Life Insurance Company*, 380 U.S. 438, 444; *Burlington Truck Lines v. United States*, *supra*. Accordingly, if this Court considers that question now to be properly before it, the proper disposition of this case is a remand to the district court for introduction of the administrative record (*supra* n. 31), thus giving the Secretary an opportunity "to disclose the basis" of his approval and "give clear indication that [he] has exercised the discretion with which Congress has empowered [him]." *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 197; *National Labor Relations Board v. Metropolitan Life Insurance Company*, 380 U.S. 438, 442-443. In this way, "[t]he administrative process will best be vindicated" and the likelihood of propelling "the court[s] into the domain which Congress has set aside exclusively for the administrative agency" best avoided. *Phelps Dodge Corp. v. National Labor Relations Board*, *supra*; *Burlington Truck Lines v. United States*, 371 U.S. 156, 169; *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196.

This is not, as petitioners contend, a case for remand to the agency. Without first reviewing the administrative record, there is no basis for a court to conclude that the Secretary acted improperly; indeed, the law generally presumes otherwise (see, *e.g.*, *United States v. Chemical Foundation*, 272 U.S. 1, 14-15; *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185; *Goldberg v. Truck Drivers Local Union No. 299*, 293 F.2d 807, 812 (C.A. 6), certiorari denied, 368 U.S. 938; *Braniff Airways, Inc. v. Civil Aeronau-*

tics Board, 379 F. 2d 453 (C.A.D.C.)), and there is nothing before this Court to contradict that presumption. As we have already pointed out (*supra*, pp. 24-27), the fact that there are no written findings in the language of the statute, is not, by itself, a reason for returning the case to the Secretary without first examining the administrative record to ascertain if such findings are needed in the circumstances of this case (see pp. 28-29, *supra*). Insistence on such formalism would burden needlessly the administrative process with ritualistic requirements that may be unnecessary. See, e.g., *City of Yonkers v. United States*, 320 U.S. 685, 697-698 (Frankfurter, J., dissenting); *Twin City Milk Producers Ass'n v. McNutt*, 123 F. 2d 396 (C.A. 8), following remand from 122 F. 2d 564.

It is, therefore, our submission that, if this Court considers the issue whether the Secretary acted arbitrarily to be in the case, the motion to remand should be grant to permit the district court to hear and determine that issue on the summary judgment motion on the basis of the administrative record. The challenge here to the Secretary's action is not entitled to a *de novo* hearing. See e.g., *Berman v. Parker*, 348 U.S. 26, 35; *Nashville I-40 Steering Committee v. Ellington*, 387 F. 2d 179, 185 (C.A. 6), certiorari denied, 390 U.S. 921; *Dredge Corp. v. Penny*, 338 F. 2d 456, 462 (C.A. 9). The judicial task is merely to determine whether the administrator's decision was arbitrary or capricious (see pp. 39-42, *infra*) on the evidence he had before him at the time it was made.

See *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650, 662 (S.D.N.Y.); *Couch v. Udall*, 265 F. Supp. 848 (W.D. Okla.); 5 U.S.C. 706. That presents only an issue of law, *Dredge Corp. v. Penny*, *supra*, and thus can appropriately be disposed of by summary judgment. Cf. *Adams v. United States*, 318 F.2d 861 (C.A. 9).

III

THE DISTRICT COURT DID NOT ERR IN DECLINING TO ORDER THE DEPOSITION OF AN ADMINISTRATIVE OFFICIAL WHERE THE ONLY PURPOSE WAS TO ASCERTAIN THE BASIS FOR HIS ACTION

Petitioners ascribe as error the refusal of both courts below to permit them to compel an administrative official to testify before trial concerning the action taken by the Secretary of Transportation.

Shortly after they commenced this litigation, petitioners noticed the deposition of Federal Highway Administrator Bridwell (A. 73); respondents moved immediately for a protective order, which was granted on January 16, 1970 (A. 74). Petitioners now assert (Pet. Br. 24) that interrogation of Bridwell was sought "to ascertain whether in fact" the Secretary had made any determinations under Section 4(f) and Section 138. However, that question can be answered only by the Secretary, who alone is vested with the responsibility to make such determinations. While the Federal Highway Administrator might be in a position

to offer his personal opinion on the subject, it is doubtful he can do much more.³⁴ Manifestly, then, the purpose for noticing Bridwell's deposition was, as originally indicated by petitioners, "to ascertain the basis, if any, for [the Secretary's] determinations"³⁵ (Application for Stay, p. 6).

That this is impermissible, even when it involves the Secretary himself, has long been recognized by this Court. In *United States v. Morgan*, 313 U.S. 409, where the Secretary of Agriculture had been "questioned at length regarding the process by which he reached the conclusions of his order [under the Packers and Stockyards Act, 7 U.S.C. 181 *et seq.*] * * *," this Court held (313 U.S. at 422):

* * * [T]he short of the business is that the Secretary should never have been subjected to this examination. * * * We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." 304 U.S. 1, 18. Just as a judge cannot be subjected to such a scrutiny * * *, so the integrity of the administrative process must be equally respected. * * *

³⁴ Bridwell, who left office along with Secretary Boyd, can shed little, or no, light on the decision by Secretary Volpe.

³⁵ It is our position that the basis for the Secretaries' decisions can best be ascertained from the administrative record. Indeed, it is on that record, and that record alone, that courts must determine whether administrative action was arbitrary or capricious or, in the alternative, unsupported by substantial evidence (*supra*, n. 31). See 5 U.S.C. (Supp. V) 706; and see, *e.g.*, *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715; *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488; *Consolidated Edison Co. et al. v. National Labor Relations Board*, 305 U.S. 197, 229.

Petitioners seek to distinguish *Morgan* on the ground that the Secretary in that case issued formal findings, whereas here he did not. As we have already demonstrated (*supra*, pp. 23-24), however, the indication on this record that the Secretary in each instance in fact made the requisite statutory determinations is no less clear than it was in *Morgan*. This is not, then, a case like *D.C. Federation of Civic Associations v. Volpe*, 316 F. Supp. 754 (D. D.C.), relied on heavily by petitioners, where the district court was unable to find any reference to the language of Section 138 in the Secretary's press release (316 F. Supp. at 770 n. 31).³⁶ Plainly, here the purpose was the prohibited one of probing the mental processes of the administrative officials. *Braniff Airways, Inc. v. Civil Aeronautics Board*, 379 F. 2d 453, 460-461 (C.A.D.C.); *D.C. Federation of Civic Associations, Inc. v. Sirica*, C.A. D.C., No. 24,216, decided May 8, 1970.

Petitioners cite *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, and its progeny (Pet. Br. pp. 25-26), as authority for permitting them to take Bridwell's deposition. These cases, however, to the extent they are apposite, support the contrary conclusion. For, in each the administrative officials were ac-

³⁶ In addition, in *D.C. Federation* there was no administrative record available for introduction in the courts (316 F. Supp. at 773, n. 36); accordingly, the testimony at trial of the Secretary was essential to judicial review of the agency action. Here, however, there is available for introduction in the district court an extensive administrative record on which the court can ascertain the basis for the determinations made. See, e.g., *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, et al.*, No. 1101, this Term, certiorari denied, December 21, 1970.

cused of acting in bad faith or as a result of political pressure, and some evidence had been introduced to substantiate the claim.³⁷ See, e.g., *Singer Sewing Machine Co. v. National Labor Relations Board*, 329 F. 2d 200 (C.A. 4); *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650 (S.D.N.Y.); *Triangle Improvement Council v. Ritchie*, *supra*; *D.C. Federation of Civic Associations v. Volpe*, *supra*. Thus, they were subjected to interrogation to answer the specific personal charges against them. In the instant case, no such claim has been made; nor has any evidence been introduced to suggest, even inferentially, such a possibility.³⁸

³⁷ In *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (*Accardi I*), an alien, who was ordered to be deported, claimed his application for suspension of deportation had been denied by the Board of Immigration for improper reasons: a prejudicial circulation by the Attorney General of a confidential list of "unsavory characters" which included his name. Thus, the alien on remand was permitted to call the Board members to testify with respect to the basis for their decision; in *Accardi II* (349 U.S. 280) their testimony was relied on to dispose of the case against Accardi.

³⁸ While the *amicus* brief of the Committee of 100 on the Federal City, Inc., attempts for the first time to interject such a claim into the instant proceedings, the effort is wholly unfounded. Here, petitioners' counsel had full access to the entire administrative record that was before the Secretary at the time the route and design were approved; yet he was unable, on examination of all the materials, to introduce any evidence contradicting the Swick Affidavit (A. 61-62). Nor was he able to claim that either Secretary reached his decision for improper reasons, or in bad faith. As to *amicus*' vague references to the Holmes memorandum (pp. 8-10), the "something similar" said to be involved in this case remains as much a mystery to the Department of Transportation as it apparently was to Mr. Wells at the time he testified. In short, petitioners' pre-trial

IV

THE STANDARD FOR JUDICIAL REVIEW IN THIS CASE IS WHETHER THE SECRETARY'S APPROVAL OF THE ROUTE AND DESIGN WAS "ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW"

There remains only the question, raised here for the first time, of what reviewing standard the district court should apply, in the event this case is remanded, in examining action by the Secretary of Transportation under Section 4(f) and Section 138.³⁹ Petitioners conceded both in the district court (A. 160-161, 163, 164) and the court of appeals (Appellant's Br. on Appeal, p. 25) that the determination by each Secretary relating to the Overton Park project could not be overturned unless it was arbitrary and capricious (5 U.S.C. 706(2)(A)).⁴⁰ However, before this Court they

discovery in this case revealed none of the apparent discrepancies which allegedly came to light during *amicus*' pre-trial discovery in a wholly separate case. Introduction of the administrative record will demonstrate conclusively that the attempt by *amicus* to make such an argument has no place in the present litigation.

³⁹ In our view, this Court could properly decline to decide this issue in the abstract. It is entirely likely that on remand the district court will determine from an examination of the administrative record that the Secretary acted properly under any test that might be applied. If not, application can be made to bring this issue again to the Court, after it has been fully considered by the lower courts and decided on the basis of a complete record.

⁴⁰ Similarly, petitioner initially did not challenge the lower courts' use of this reviewing standard on their application for stay filed with this Court, raising the issue for the first time in their brief supporting the stay application, at pp. 28-29. This, in

argue, presumably based on a footnote in the dissent below (A. 189-190 n. 1), that the administrative decisions can be upheld only if supported by "substantial evidence" as required by 5 U.S.C. 706(2)(E).

That the "substantial evidence" standard has no application to the instant proceedings is clear from the face of the Administrative Procedure Act. It is, by the express terms of the statute, to be used only in cases where the court is reviewing action by an agency taken pursuant to the rule-making provisions of the Act (5 U.S.C. 553), or agency action based on an adjudicatory hearing~~y~~ as required in Section 556 and 557 of the Act (5 U.S.C. 554), or an agency determination subject to review "on the record of an agency hearing provided by statute" (5 U.S.C. 706(2)(E)). The instant case comes within none of the enumerated categories.

As we earlier indicated (*supra*, pp. 24-25), the Secretary of Transportation's determinations under Section 4(f) and Section 138 are subject to neither the rule-making provisions, nor the "adjudication" provisions of the Administrative Procedure Act. Even petitioners recognize (Pet. Br. 25) that "[i]n the present case * * * the Secretary of Transportation was not acting in a quasi-judicial capacity."

Similarly, the Secretary's action is not reviewable "on the record of an agency hearing required by statute." There is no provision in the Department of Transportation Act or in the Federal-Aid Highway

itself, may be sufficient ground for this Court to decline to consider the question. *Safeway Stores, Inc. v. Oklahoma Grocers Ass'n*, 360 U.S. 334, 342 n. 7.

Act calling for such a hearing. Indeed, as already noted (*supra*, p. 25), the only hearing required in these circumstances is a public hearing by state officials (23 U.S.C. 128), which is by nature non-adjudicatory and quasi-legislative, designed to inform the community of the highway project under consideration and to elicit the personal views, opinions and observations of individuals in that community concerning the project. Even if this could be construed as a hearing conducted by the "agency" within the literal language of 5 U.S.C. 706(2)(E), and we submit that it cannot (cf. *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F. 2d 624 (C.A.D.C.) ; *Charlton v. United States*, 412 F. 2d 390, 395 (C.A. 3) (concurring opinion) ; *Borden Company v. Freeman, et al.*, 256 F. Supp. 592, 600-602 (D.N.J.)), the legislative history of the Act reflects that this is not the type of "hearing" Congress had in mind when it enacted the Administrative Procedure Act; the "substantial evidence" rule was intended to apply exclusively to trial-type hearings of an adjudicatory, quasi-judicial nature. H. Rep. No. 1980, 79th Cong., 2d Sess., reprinted in Senate Judiciary Committee, *Legislative History of the Administrative Procedure Act*, at p. 279; and see *Gart v. Cole*, 263 F. 2d 244, 251 (C.A. 2).

At all events, the argument must fail for yet another reason. Irrespective of how the state public hearing may be characterized, judicial review of the Secretary's approval is not limited to the record of that hearing. It is, instead, required by statute to rest on "the whole record" that served as a basis for the administrative action taken (5 U.S.C. 706), of which the transcripts of the state public hearing comprise but a

small part. See, e.g., *Road Review League, Town of Bedford v. Boyd*, *supra*. "Section 706 is mandatory by its terms and not merely declarative of 'guidelines' with respect to the scope of judicial review of a federal agency's action." *Charlton v. United States*, 412 F. 2d 390, 392 (C.A. 3).

Accordingly, the proper reviewing standard is the one applied by both courts below and consistently followed by other courts in litigation of this type. See, e.g., *Udall v. Washington, Virginia and Maryland Coach Co.*, 398 F. 2d 765 (C.A.D.C.); *Nashville I-40 Steering Committee v. Ellington*, 387 F. 2d 179, 185 (C.A. 6); *Western Addition Community Organization v. Weaver*, 294 F. Supp. 433, 437 (N.D. Calif.), ~~on~~ remand, *Western Addition Community Organization v. Romney*, N.D. Calif., No. 490533, decided March 5, 1969; *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650, 659-660 (S.D.N.Y.); *D.C. Federation of Civic Associations v. Volpe*, 316 F. Supp. 754 (D.D.C.). The judicial task is to ascertain only whether the decision to route Interstate I-40 through Overton Park as a depressed highway was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. (Supp. V) 706(2)(A)).⁴¹

⁴¹ Petitioners also contend that an alternative reviewing standard that could be followed in this case is the one set forth in 5 U.S.C. (Supp. V) 706(2)(F), which provides that the reviewing court may hold unlawful agency action that is "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." Here, however, as we have already pointed out (*supra*, 34), the determinations Congress explicitly required the Secretary of Transportation to make are not entitled to a *de novo* hearing. It is not for the courts to substitute their judgment for that of the Secretary in this area. See *Berman v. Parker*, 348 U.S. 26, 35.

CONCLUSION

For the reasons stated, this Court should affirm the judgments below and decline to consider those issues which were not raised by petitioners' pleadings. In the alternative, it should vacate the judgment of the court of appeals and remand the case to the district court with instructions to vacate its judgment granting respondents' motion for summary judgment in order to enable the Secretary of Transportation to introduce the entire administrative record on which his decisions were based.

Respectfully submitted.

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JANUARY 1971.

No. 1066

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Jan. 4, 1971.
(not printed)

JAN 8 1971

IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 1066

CITIZENS TO PRESERVE OVERTON PARK,
INC., WILLIAM W. DEUPREE, SR., SUNSHINE
K. SNYDER, SIERRA CLUB, and NATIONAL
AUDUBON SOCIETY,

Petitioners,

v.

JOHN A. VOLPE, Secretary
Department of Transportation,
and
CHARLES W. SPEIGHT, Commissioner
Tennessee Department of Highways,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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January 8, 1971

IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 1066

CITIZENS TO PRESERVE OVERTON PARK,
INC., WILLIAM W. DEUPREE, SR., SUNSHINE
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

1. In *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969), this Court followed the “general rule . . . that an appellate court must apply the law in effect at the time it renders its decision” (footnote omitted) 393 U.S. at 281. It held that a Department of Housing and Urban Development circular was applicable even though issued after the eviction proceedings involved in that case

had been initiated. Under the holding in *Thorpe*, the Department of Transportation Regulation issued on October 7, 1970 (DOT Order 5610.1) requiring formal findings by the Secretary of Transportation in cases involving 49 U.S.C. (Supp. V) § 1653(f) is applicable here, and the decision below must be reversed because of the Secretary's admitted failure to make the required findings.

Secretary Volpe argues that because the state has acquired the right-of-way for this route, this case comes within the narrow exception, stated in *Thorpe*, where the general rule is not applied in order "to prevent manifest injustice." (Footnote omitted.) 393 U.S. at 282. That position is untenable for three reasons.

(a) The DOT Order establishes procedures for administration of statutes designed to preserve park lands. Since the construction of this route through Overton Park has not begun and harm to the park has not yet been inflicted, this case is precisely analogous to *Thorpe* where, at the time of decision in this Court, the tenant had not been evicted. Thus with respect to the preservation of the park, there has not been, as suggested by the Secretary, any "change in circumstances" which would render the general rule stated in *Thorpe*, and the DOT Order, inapplicable.

(b) The Secretary was unable to point to any evidence of right-of-way acquisition or any other change in circumstance occurring subsequent to Secretary Volpe's approval of the design of the highway in November 1969. Indeed he does not even argue that there has been any change of circumstances since that decision. Therefore, even under the Secretary's interpretation of *Thorpe*, the November 1969 decision must be judged in light of the DOT Order, and since it is undisputed that Secretary Volpe made no formal findings, petitioners are entitled to judgment on that issue.

(c) The Secretary argues that the April 1968 approval of the location of this highway should not be reviewed under the DOT Order because, says the Secretary, right-of-way adjacent to and in the park has been acquired by the

state subsequent to that approval. The record shows, however, that the Department of Transportation authorized the acquisition of that right-of-way in May 1967, nearly a year prior to the April 1968 decision. (A. 28) Furthermore the Secretary apparently concedes that the Department authorized the acquisition of this right-of-way without making the determinations required by 49 U.S.C. (Supp. III) § 1653(f). This was, we submit, a clear violation of the statute and the acquisitions made as a result of that violation should not bring the Secretary within the narrow exception to *Thorpe*. Moreover, the record demonstrates that the acquisition of much of the right-of-way leading to the park had been completed prior to the 1968 determination. (A. 36) The acquisition of the right-of-way leading to this park prior to the 1968 determination is no basis for concluding that it would be a "manifest injustice" to hold the DOT Order applicable to the 1968 determination.

2. Secretary Volpe, while now conceding that the courts below erred in granting and affirming summary judgment for respondents on the basis of affidavits characterizing documents which are included in the "administrative record," and agreeing that a remand is necessary in this case, seeks to impose unwarranted limitations on the conditions of that remand. The Secretary requests a remand solely for the purpose of introducing the "administrative record" and seeks to limit the further proceedings to a motion for summary judgment on which the district court would determine whether the Secretary's actions were arbitrary and capricious. (Brief for Secretary at 30, 34, 35, 36) We suggest that if this Court remands to the district court, it should not order the district court to resolve the issues in this case on a motion for summary judgment. The terms of the remand should permit the district court to hold whatever kind of hearing or proceeding that appears necessary, in light of the evidence offered, to resolve the issues before it. It would be a mistake to attempt to limit the nature of the proceedings in the lower courts before the "administrative record" has been introduced. For instance

once that "record" is introduced, the district court might well conclude that the documents presented by the Secretary are not adequate to reveal the basis for his decisions. The mere fact that the Department has a "carton" (Brief for Secretary fn. 31) of documents which it characterizes as the "administrative record" is not dispositive of whether there is a record that adequately reveals the basis for the Secretary's action. For example in *D.C. Federation of Civic Ass'n v. Volpe*, 316 F. Supp. 754 (D.D.C. 1970), despite the fact that over 100 exhibits were introduced, the majority of which were obtained by discovery from the Department of Transportation, the district court found that there was no "meaningful administrative record" and a trial was necessary. The same was true in *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967) and *Triangle Improvement Council v. Ritchie*, 314 F. Supp. 20 (D.W.Va. 1969), *aff'd*, 429 F.2d 423 (4th Cir.), *certiorari granted*, December 21, 1970, No. 712, this Term. Additionally in *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, et al.*, No. 1011, this Term, *certiorari denied*, December 21, 1970, the Secretary introduced not only documents on which his determination was based, but he also found it necessary to supplement those with affidavits to explain what decisions were made and why. Thus it seems likely that in this case, since there was never any "record" in the formal sense of the term, it will still be necessary, as in the cases above, to hear additional evidence even after the Secretary has introduced those documents which he contends represent the complete administrative record. This Court should not foreclose, at this time and on this record, the district court from hearing such evidence.

Furthermore the Secretary concedes (Brief for Secretary at p. 25 fn. 25, pp. 40-42) that in approving projects of this nature, he considers evidence in addition to that submitted at the public hearings. Indeed, he states the public hearings "comprise but a small part" of the evidence con-

sidered. (Brief at 41-42) In this case, insofar as he relied on evidence not submitted at the public hearings, the Secretary acted on evidence which those challenging his decision have had no opportunity to rebut. Petitioners should not be foreclosed by the terms of any remand from presenting competent and relevant evidence which would rebut this evidence relied on by the Secretary. This Court has held on a number of occasions that one attacking administrative decisions must be given an opportunity to meet the evidence relied upon by the Administrator. *E.g., Morgan v. United States*, 304 U.S. 1, 18-20 (1938); *Gonzales v. United States*, 348 U.S. 407 (1955). *Cf. United States v. Utah Construction Co.*, 384 U.S. 394, 422 (1966); Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 186-92, 1 DAVIS ADMINISTRATIVE LAW 412.¹ Two examples indicate the necessity for such evidence. If the documents introduced indicate that the Secretary rejected a depressed design on the ground that a pump required to aid drainage is unsafe and therefore "impossible," petitioners should be allowed to show that the Department of Transportation has approved for use in the interstate system the very same type of pump that would be required here. (A. 76-77) (Recent decisions by the Administrator inconsistent with that under review are relevant as to whether the statutory standard has been followed. *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 440, 442 (1965).) Similarly if the "administrative record" indicates that the Secretary ruled out use of a siphon because it would "require an open pool creating a malarial hazard and danger to human and animal life" (A. 29), surely it would be relevant to show that the Department of the Interior is involved in projects involving

¹Davis says:

"a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts" 1 DAVIS, ADMINISTRATIVE LAW at 412.

siphons and has determined that these problems cited by the Secretary can be overcome with "no undue difficulty." (A. 76)²

It is important to emphasize that the question of the nature of the proceeding to be held in the district court is separate and distinct from the standard of review of the Secretary's decision. The Secretary appears to argue that any proceeding other than a review on a motion for summary judgment would amount to a wholly *de novo* proceeding with a court substituting its judgment for that of the Secretary. (Brief for the Secretary at 34, 42) That is not the case at all. Indeed in at least three of the cases relied on by the Secretary as stating the proper standard of review, *Udall v. Washington, Virginia and Maryland Coach Co.*, 398 F.2d 765 (D.C. Cir. 1968); *Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968), and *D.C. Federation of Civic Ass'n v. Volpe*, 316 F.Supp. 754 (D. D.C. 1970), the courts conducted trials and made *de novo* factual determinations. Thus regardless of whether the district court is to review the Secretary's actions under the "arbitrary and capricious," the "substantial evidence," or the "unwarranted by the facts" standard, it should not be foreclosed from receiving evidence *de novo*. See also, Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 187.

Thus we submit that if this Court remands the case, it should not require that the district court resolve the issues solely on the government's motion for summary judgment. Instead, the case should be remanded for purposes of determining whether the Secretary has complied with the stat-

²The Secretary has not objected to the relevancy of this evidence contained in affidavits submitted by petitioners.

utes, thereby permitting the court to receive whatever evidence may be relevant.

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January 8, 1971



NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL. v. VOLPÈ, SECRETARY, DEPARTMENT OF TRANSPORTATION, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

January 11, 1971

No. 1066. Argued ~~December 7, 1970~~ — Decided March 2, 1971

Under § 4 (f) of the Department of Transportation Act of 1966 and § 138 of the Federal-Aid Highway Act of 1968, the Secretary of Transportation may not authorize use of federal funds to finance construction of highways through public parks if a "feasible and prudent" alternative route exists. If no such route is available, he may approve construction only if there has been "all possible planning to minimize harm" to the park. Petitioners contend that the Secretary has violated these statutes by authorizing a six-lane interstate highway through a Memphis public park. In April 1968 the Secretary announced that he agreed with the local officials that the highway go through the park; in September 1969 the State acquired the right-of-way inside the park; and in November 1969 the Secretary announced final approval, including the design, of the road. Neither announcement of the Secretary was accompanied by factual findings. Respondents introduced affidavits in the District Court, indicating that the Secretary had made the decision and that it was supportable. Petitioners filed counter affidavits and sought to take the deposition of a former federal highway administrator. The District Court and the Court of Appeals found that formal findings were not required and refused to order the deposition of the former administrator. Both courts held that the affidavits afforded no basis for determining that the Secretary exceeded his authority. *Held*:

1. The Secretary's action is subject to judicial review pursuant to § 701 of the Administrative Procedure Act. Pp. 6-10.

(a) There is no indication here that Congress sought to limit or prohibit judicial review. P. 7.

Syllabus

(b) The exemption for action "committed to agency discretion" does not apply as the Secretary does have "law to apply," rather than wide-ranging discretion. Pp. 7-10.

2. Although under § 706 of the Act *de novo* review is not required here and the Secretary's approval of the route need not meet the substantial evidence test, the reviewing court must conduct a substantial inquiry and determine whether the Secretary acted within the scope of his authority, whether his decision was within the small range of available choices, and whether he could have reasonably believed that there were no feasible alternatives. The court must find that the actual choice was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and that the Secretary followed the necessary procedural requirements. Pp. 10-13.

3. Formal findings by the Secretary were not required in this case. Pp. 14-16.

(a) The relevant statutes do not require formal findings, and there is no ambiguity in the Secretary's action. P. 14.

(b) Although a regulation requiring formal findings was issued after the Secretary had approved the route, a remand to him is not necessary as there is an administrative record facilitating full and prompt review of the Secretary's action. Pp. 14-16.

4. The case is remanded to the District Court for plenary review of the Secretary's decision. Pp. 16-17.

(a) The lower courts' review was based on litigation affidavits, which are not the whole record and are an inadequate basis for review. P. 16.

(b) In view of the lack of formal findings, the court may require the administrative officials who participated in the decision to give testimony explaining their action or require the Secretary to make formal findings. P. 17.

432 F. 2d 1307, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, STEWART, WHITE, and BLACKMUN, JJ., joined. BLACK, J., filed a separate opinion, in which BRENNAN, J., joined. BLACKMUN, J., filed a separate statement. DOUGLAS, J., took no part in the consideration or decision of this case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 1066.—OCTOBER TERM, 1970

Citizens to Preserve Overton
Park, Inc., et al.,
Petitioners,
v.
John A. Volpe, Secretary,
Department of Transportation, et al.

On Writ of Certiorari to
the United States Court
of Appeals for the
Sixth Circuit.

[March 2, 1971]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The growing public concern about the quality of our natural environment has prompted Congress in recent years to enact legislation¹ designed to curb the accelerating destruction of our country's natural beauty. We are concerned in this case with § 4 (f) of the Department of Transportation Act of 1966² and § 138 of the Federal-

¹ See, e. g., The National Environmental Policy Act, 42 U. S. C. § 4321; Environmental Education Act, 20 U. S. C. § 1531; Air Quality Act of 1967, 42 U. S. C. § 1857 *et seq.*; Environmental Quality Improvement Act of 1970, 42 U. S. C. §§ 4372-4374.

² "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public

2 CITIZENS TO PRESERVE OVERTON PARK v. VOLPE

Aid to Highway Act of 1968.³ These statutes prohibit the Secretary of Transportation from authorizing the use of federal funds to finance the construction of highways through public parks if a "feasible and prudent" ⁴ alternative route exists. If no such route is available, the statutes allow him to approve construction through parks only if there has been "all possible planning to minimize harm" ⁵ to the park.

park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use." 49 U. S. C. § 1653 (f) (Supp. V).

³ "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned lands from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use." 23 U. S. C. § 138 (Supp. V).

⁴ 49 U. S. C. § 1653 (f) (Supp. V); 23 U. S. C. § 138 (Supp. V).

⁵ 49 U. S. C. § 1653 (f) (Supp. V); 23 U. S. C. § 138 (Supp. V).

Petitioners, private citizens as well as local and national conservation organizations, contend that the Secretary has violated these statutes by authorizing the expenditure of federal funds⁶ for the construction of a six-lane interstate highway through a public park in Memphis, Tennessee. Their claim was rejected by the District Court,⁷ which granted the Secretary's motion for summary judgment, and the Court of Appeals for the Sixth Circuit affirmed.⁸ After oral argument, this Court granted a stay that halted construction and, treating the application for the stay as a petition for certiorari, granted review.⁹ — U. S. —. We now reverse the judgment below and remand for further proceedings in the District Court.

Overton Park is a 342-acre city park located near the center of Memphis. The park contains a zoo, a nine-hole municipal golf course, an outdoor theatre, nature trails, a bridle path, an art academy, picnic areas, and 170 acres of forest. The proposed highway, which is to be six-lane, high-speed, expressway,¹⁰ will sever the zoo from the rest of the park. Although the roadway will be depressed below ground level except where it crosses a small creek, 26 acres of the park will be destroyed. The highway is to be a segment of Interstate Highway No. I-40, part of the National System of Interstate

⁶ See 23 U. S. C. § 103.

⁷ The case originated in the United States District Court for the District of Columbia. On application of the Secretary of Transportation it was transferred to the United States District Court for the Western District of Tennessee, which entered the summary judgment.

⁸ — F. 2d — (CA6 1970).

⁹ This Court ordered the case to be heard on an expedited schedule.

¹⁰ The proposed right-of-way will be 250 to 450 feet wide and will follow the route of a presently existing, nonaccess bus route, which carries occasional bus traffic along a 40- to 50-foot right-of-way.

and Defense Highways.¹¹ I-40 will provide Memphis with a major east-west expressway that will allow easier access to downtown Memphis from the residential areas on the eastern edge of the city.¹²

Although the route through the park was approved by the Bureau of Public Roads in 1956¹³ and by the Federal Highway Administrator in 1966, the enactment of § 4 (f) of the Department of Transportation Act prevented distribution of federal funds for the section of the highway designated to go through Overton Park until the Secretary of Transportation determined whether the requirements of § 4 (f) had been met. Federal funding for the rest of the project was, however, available; and the state acquired right-of-way on both sides of the park.¹⁴ In April 1968, the Secretary announced that he concurred in the judgment of local officials that I-40 should be built through the park. And in September 1969 the State acquired the right-of-way inside Overton Park from the city.¹⁵ Final approval for the project—the route as well as the design—was not announced until November 1969, after Congress had reiterated in § 138 of the Federal-Aid Highway Act

¹¹ See 23 U. S. C. § 103 (d).

¹² I-40 will also provide an express bypass for east-west traffic through Memphis.

¹³ At that time the Bureau of Public Roads was a part of the Department of Commerce. The Department of Transportation Act, 49 U. S. C. § 1651 *et seq.* (Supp. V.), which became effective on April 1, 1967, transferred the Bureau to the new Department of Transportation.

¹⁴ The Secretary approved these acquisitions in 1967 prior to the effective date of § 4 (f).

¹⁵ The State paid the City \$2,000,000 for the 26-acre right-of-way and \$206,000 to the Memphis Park Commission to replace park facilities that were to be destroyed by the highway. The city of Memphis has used \$1,000,000 of these funds to pay for a new 160-acre park and it is anticipated that additional parkland will be acquired with the remaining money.

that highway construction through public parks was to be restricted. Neither announcement approving the route and design of I-40 was accompanied by a statement of the Secretary's factual findings. He did not indicate why he believed there were no feasible and prudent alternative routes or why design changes could not be made to reduce the harm to the park.

Petitioners contend that the Secretary's action is invalid without such formal findings¹⁶ and that the Secretary did not make an independent determination but merely relied on the judgment of the Memphis City Council.¹⁷ They also contend that it would be "feasible and prudent" to route I-40 around Overton Park either to the north or to the south. And they argue that if these alternative routes are not "feasible and prudent," the present plan does not include "all possible" methods for reducing harm to the park. Petitioners claim that I-40 could be built under the park by using either of two possible tunneling methods,¹⁸ and they claim that, at a

¹⁶ Respondents argue that the only issue raised by petitioners' pleadings is the failure of the Secretary to make formal findings. But when petitioners' complaint is read in the revealing light of *Conley v. Gibson*, 355 U. S. 41 (1957), it is clear that petitioners have also challenged the merits of the Secretary's decision.

¹⁷ Petitioners contend that former Federal Highway Administrator Bridwell's account of an April 3, 1968, meeting with the Memphis City Council given to the Senate Subcommittee on Roads of the Senate Committee on Public Works supports this charge. See Hearings on Urban Highway Planning, Location, and Design before the Subcommittee on Roads of the Senate Committee on Public Works, 90th Cong., 1st and 2d Sess., pt. 2, at 478-480 (1968).

¹⁸ Petitioners argue that either a bored tunnel or a cut-and-cover tunnel, which is a fully depressed route covered after construction, could be built. Respondents contend that the construction of a tunnel by either method would greatly increase the cost of the project, would create safety hazards, and because of increases in air pollution would not reduce harm to the park.

minimum, by using advanced drainage techniques¹⁹ the expressway could be depressed below ground level along the entire route through the park including the section that crosses the small creek.

Respondents argue that it was unnecessary for the Secretary to make formal findings and, that he did, in fact, exercise his own independent judgment that was supported by the facts. In the District Court, respondents introduced affidavits, prepared specifically for this litigation, which indicated that the Secretary had made the decision and that the decision was supportable. These affidavits were contradicted by affidavits introduced by petitioners, who also sought to take the deposition of a former federal highway administrator²⁰ who had participated in the decision to route I-40 through Overton Park.

The District Court and the Court of Appeals found that formal findings by the Secretary were not necessary and refused to order the deposition of the former Federal Highway Administrator because those courts believed that probing of the mental processes of an administrative decisionmaker was prohibited. And, believing that the Secretary's authority was wide and reviewing courts' authority narrow in the approval of highway routes, the lower courts held that the affidavits contained no basis for a determination that the Secretary had exceeded his authority.

We agree that formal findings were not required. But we do not believe that in this case judicial review based solely on litigation affidavits was adequate.

A threshold question—whether petitioners are entitled to any judicial review—is easily answered. Section 701

¹⁹ Petitioners contend that adequate drainage could be provided by using mechanical pumps or some form of inverted siphon. They claim that such devices are often used in expressway construction.

²⁰ Petitioners wanted to question former Highway Administrator Bridwell. See n. 17, *supra*.

of the Administrative Procedure Act, 5 U. S. C. § 701 (Supp. V.), provides that the action of "each authority of the Government of the United States," which includes the Department of Transportation,²¹ is subject to judicial review except where there is a statutory prohibition on review or where "agency action is committed to agency discretion by law." 5 U. S. C. § 701 (Supp. V). In this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no "showing of 'clear and convincing evidence' of a . . . legislative intent" to restrict access to judicial review. *Abbott Laboratories v. Gardner*, 387 U. S. 136, 141 (1967). *Brownell v. We Shung*, 352 U. S. 180, 185 (1956).²²

Similarly, the Secretary's decision here does not fall within the exception for action "committed to agency discretion." This is a very narrow exception.²³ Berger, *Administrative Arbitrariness and Judicial Review*, 65 Col. L. Rev. 55 (1965). The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply." S. Rep. No. 758, Senate Committee on the Judiciary, 79th Cong., 1st Sess., 26 (1945).

Section 4 (f) of the Department of Transportation Act and § 138 of the Federal-Aid Highway Act are clear and

²¹ In addition, the Department of Transportation Act makes the Administrative Procedure Act applicable to proceedings of the Department of Transportation. 49 U. S. C. § 1655 (h) (Supp. V).

²² See also *Rusk v. Cort*, 369 U. S. 367, 379-380 (1962).

²³ The scope of this exception has been the subject of extensive commentary. See, e. g., Berger, *Administrative Arbitrariness: A Synthesis*, 78 Yale L. J. 965 (1969); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367 (1968); Davis, *Administrative Arbitrariness is Not Always Reviewable*, 51 Minn. L. Rev. 643 (1967); Berger, *Administrative Arbitrariness: A Sequel*, 51 Minn. L. Rev. 601 (1967).

specific directives. Both the Department of Transportation Act and the Federal-Aid to Highway Act provide that the Secretary "shall not approve any program or project" that requires the use of any public parkland "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park" 23 U. S. C. § 138 (Supp. V); 49 U. S. C. § 1653 (f) (Supp. V). This language is a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted.

Despite the clarity of the statutory language, respondents argue that the Secretary has wide discretion. They recognize that the requirement that there be no "feasible" alternative route admits of little administrative discretion. For this exemption to apply the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route.²⁴ Respondents argue, however, that the requirement that there be no other "prudent" route requires the Secretary to engage in a wide-ranging balancing of competing interests. They contend that the Secretary should weigh the detriment resulting from the destruction of parkland against the cost of other routes, safety considerations, and other factors, and determine on the basis of the importance that he attaches to these other factors whether, on balance, alternative feasible routes would be "prudent."

But no such wide-ranging endeavor was intended. It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible. Although it may be necessary to transfer funds from one jurisdiction to another,²⁵ there

²⁴ See 114 Cong. Rec. 19915 (Statement by Rep. Holifield).

²⁵ See n. 15, *supra*.

will always be a smaller outlay required from the public purse²⁶ when parkland is used since the public already owns the land and there will be no need to pay for right-of-way. And since people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business. Such factors are common to substantially all highway construction. Thus if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes.

Congress clearly did not intend that cost and disruption of the community were to be ignored²⁷ by the Secretary.²⁸ But the very existence of the statute²⁹ indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or

²⁶ See 114 Cong. Rec. 24037 (Statement by Sen. Yarborough).

²⁷ See, *e. g.*, S. Rep. No. 1340, 90th Cong., 2d Sess., 18-19; H. Rep. No. 1584, 90th Cong., 2d Sess., 12.

²⁸ The legislative history indicates that the Secretary is not to limit his consideration to information supplied by state and local officials but is to go beyond this information and reach his own independent decision. 114 Cong. Rec. 24036-24037.

²⁹ The legislative history of both § 4 (f) of the Department of Transportation Act, 49 U. S. C. § 1653 (f) (Supp. V), and § 138 of the Federal-Aid Highway Act, 23 U. S. C. § 138 (Supp. V), is ambiguous. The legislative committee reports tend to support Respondents' view that the statutes are merely general directives to the Secretary requiring him to consider the importance of parkland as well as cost, community disruption, and other factors. See, *e. g.*, S. Rep. No. 1340, 90th Cong., 2d Sess., 19; H. Rep. No. 1584, 90th Cong., 2d Sess., 12. Statements by proponents of the statutes as well as the Senate committee report on § 4 (f) indicate, however, that the Secretary was to have limited authority. See, *e. g.*, 114 Cong. Rec. 24033-24037; S. Rep. No. 1627, 89th Cong., 2d Sess., 22. See also H. Conf. Rep. No. 2236, 89th Cong., 2d Sess., 25. Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent.

community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.

Plainly, there is "law to apply" and thus the exemption for action "committed to agency discretion" is inapplicable. But the existence of judicial review is only the start: the standard for review must also be determined. For that we must look to § 706 of the Administrative Procedure Act, 5 U. S. C. § 706 (Supp. V), which provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found" not to meet six separate standards.³⁰ In all cases agency

³⁰ "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U. S. C. § 706 (Supp. V).

action must be set aside if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U. S. C. § 706 (2)(A)(B)(C)(D) (Supp. V). In certain narrow, specifically limited situations, the agency action is to be set aside if the action was not supported by "substantial evidence." And in other equally narrow circumstances the reviewing court is to engage in a *de novo* review of the action and set it aside if it was "unwarranted by the facts." 5 U. S. C. § 706 (2)(E)(F) (Supp. V).

Petitioners argue that the Secretary's approval of the construction of I-40 through Overton Park is subject to one or the other of these latter two standards of limited applicability. First, they contend that the "substantial evidence" standard of § 706 (2)(E) must be applied. In the alternative, they claim that § 706 (2)(F) applies and that there must be a *de novo* review to determine if the Secretary's action was "unwarranted by the facts." Neither of these standards is, however, applicable.

Review under the substantial evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, 5 U. S. C. § 553 (Supp. V), or when the agency action is based on a public adjudicatory hearing. See 5 U. S. C. §§ 556, 557 (Supp. V). The Secretary's decision to allow the expenditure of federal funds to build I-40 through Overton Park was plainly not an exercise of a rulemaking function. See K. Davis, *Administrative Law Treatise* § 5.01 (1958). And the only hearing that is required by either the Administrative Procedure Act or the statutes regulating the distribution of federal funds for highway construction is a public hearing conducted by local officials for the purpose of informing the community about the proposed project and eliciting com-

munity views on the design and route. 23 U. S. C. § 128 (Supp. V). The hearing is nonadjudicatory, quasi-legislative in nature. It is not designed to produce a record that is to be the basis of agency action—the basic requirement for substantial evidence review. See H. Rep. No. 1980, 79th Cong., 2d Sess., reprinted in Senate Judiciary Committee, Legislative History of The Administrative Procedure Act 279.

Petitioners' alternative argument also fails. *De novo* review of whether the Secretary's decision was "unwarranted by the facts" is authorized by § 706 (2)(F) in only two circumstances. First, such *de novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action. H. Rep. No. 1980, 79th Cong., 2d Sess., reprinted in Senate Judiciary Committee, Legislative History of the Administrative Procedure Act 279. Neither situation exists here.

Even though there is no *de novo* review in this case and the Secretary's approval of the route of I-40 does not have ultimately to meet the substantial evidence test, the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's decision is entitled to a presumption of regularity. See, e. g., *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 185 (1935); *United States v. Chemical Foundation*, 272 U. S. 1, 14-15 (1926). But that presumption is not to shield his action from a thorough, probing, in-depth review.

The court is first required to decide whether the Secretary acted within the scope of his authority. *Schilling v. Rogers*, 363 U. S. 666, 676-677 (1960). This determination naturally begins with a delineation of the scope of

the Secretary's authority and discretion. L. Jaffe, *Judicial Control of Administrative Action* 359 (1965). As has been shown, Congress has specified only a small range of choices that the Secretary can make. Also involved in this initial inquiry is a determination of whether on the facts the Secretary's decision can reasonably be said to be within that range. The reviewing court must consider whether the Secretary properly construed his authority to approve the use of parkland as limited to situations where there are no feasible alternative routes or where feasible alternative routes involve uniquely difficult problems. And the reviewing court must be able to find that the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems.

Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706 (2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. § 706 (2)(A) (Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. L. Jaffe, *supra*, at 182. See *McBee v. Bomar*, 296 F. 2d 235, 237 (CA6 1961); *In re Josephson*, 218 F. 2d 174, 182 (CA1 1954); *Western Addition Community Organization v. Weaver*, 294 F. Supp. 433 (ND Calif. 1968). See also *Wong Wing Hang v. Immigration & Naturalization Serv.*, 360 F. 2d 715, 719 (CA2 1966). Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

The final inquiry is whether the Secretary's action followed the necessary procedural requirements. Here the only procedural error alleged is the failure of the Secretary to make formal findings and state his reason for allowing the highway to be built through the park.

Undoubtedly, review of the Secretary's action is hampered by his failure to make such findings, but the absence of formal findings does not necessarily require that the case be remanded to the Secretary. Neither the Department of Transportation Act nor the Federal-Aid Highway Act requires such formal findings. Moreover, the Administrative Procedure Act requirements that there be formal findings in certain rulemaking and adjudicatory proceedings do not apply to the Secretary's action here. See 5 U. S. C. § 553 (a)(2) (Supp. V); 5 U. S. C. § 554 (a) (Supp. V). And, although formal findings may be required in some cases in the absence of statutory directives when the nature of the agency action is ambiguous, those situations are rare. See *City of Yonkers v. United States*, 320 U. S. 685 (1944); *American Trucking Assn. v. United States*, 344 U. S. 298, 320 (1953). Plainly, there is no ambiguity here; the Secretary has approved the construction of I-40 through Overton Park and has approved a specific design for the project.

Petitioners contend that although there may not be a statutory requirement that the Secretary make formal findings and even though this may not be a case for the reviewing court to impose a requirement that findings be made, Department of Transportation regulations require them. This argument is based on DOT Order 5610.1,³¹ which requires the Secretary to make formal

³¹ The regulation was promulgated pursuant to Executive Order 11514, dated March 5, 1970, which instructed all federal agencies to initiate procedures needed to direct their policies and programs toward meeting national environmental goals.

findings when he approves the use of parkland for highway construction but which was issued after the route for I-40 was approved.³² Petitioners argue that even though the order was not in effect at the time approval was given to the Overton Park project and even though the order was not intended to have retrospective effect the order represents the law at the time of this Court's decision and under *Thorpe v. Housing Authority*, 393 U. S. 268, 281-282 (1969), should be applied to this case.

The *Thorpe* litigation resulted from an attempt to evict a tenant from a federally funded housing project under circumstances that suggested that the eviction was prompted by the tenant's objections to the management of the project. Despite repeated requests, the Housing Authority would not give an explanation for its action. The tenant claimed that the eviction interfered with her exercise of First Amendment rights and that the failure to state the reasons for the eviction and to afford her a hearing denied her due process. After denial of relief in the state courts, this Court granted certiorari "to consider whether [the tenant] was denied due process by the Housing Authority's refusal to state the reasons for her eviction and to afford her a hearing at which she could contest the sufficiency of those reasons." 393 U. S., at 272.

While the case was pending in this Court, the Department of ~~Health, Education, and Welfare~~ issued regulations requiring Housing Authority officials to inform tenants of the reasons for an eviction and to give a tenant the opportunity to reply. The case was then remanded to the state courts to determine if the ~~HEW~~ regulations were applicable to that case. The state court held them not to be applicable and this Court reversed on the

³² DOT Order 5610.1 was issued on October 7, 1970.

ground that the general rule is "that an appellate court must apply the law in effect at the time it renders its decision."

While we do not question that DOT Order 5610.1 constitutes the law in effect at the time of our decision, we do not believe that *Thorpe* compels us to remand for the Secretary to make formal findings.³³ Here, unlike the situation in *Thorpe*, there has been a change in circumstances—additional right-of-way has been cleared and the 26-acre right-of-way inside Overton Park has been purchased by the State. Moreover, there is an administrative record that allows the full, prompt review of the Secretary's action that is sought without additional delay which would result from having a remand to the Secretary.

That administrative record is not, however, before us. The lower courts based their review on the litigation affidavits that were presented. These affidavits were merely "post hoc" rationalizations, *Burlington Truck Lines v. United States*, 371 U. S. 156, 168-169 (1962), which have traditionally been found to be an inadequate basis for review. *Burlington Truck Lines v. United States*, *supra*; *SEC v. Chenery Corp.*, 318 U. S. 80, 87 (1943). And they clearly do not constitute the "whole record" compiled by the agency: the basis for review required by § 706 of the Administrative Procedure Act. See n. 30, *supra*.

³³ Even if formal findings by the Secretary were mandatory, the proper course would be to remand the case to the District Court directing that court to order the Secretary to make formal findings. See R. Robertson & S. Kirkham, *Jurisdiction of the Supreme Court of the United States* § 446, at 929 (Wolfson & Kurland, ed., 1951). Of course, the District Court is not prohibited from remanding the case to the Secretary. See *infra*, at —.

Thus it is necessary to remand this case to the District Court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision.³⁴ But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.

The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided. *United States v. Morgan*, 313 U. S. 409, 422 (1941). And where there are administrative findings that were made at the same time as the decision, as was the case in *Morgan*, there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves. See *Shaughnessy v. Accardi*, 349 U. S. 280 (1955).

The District Court is not, however, required to make such an inquiry. It may be that the Secretary can prepare formal findings including the information required by DOT Order 5610.1 that will provide an adequate explanation for his action. Such an explanation will, to some extent, be a "post hoc rationalization" and thus

³⁴ The Solicitor General now urges that in order to avoid additional delay the proper course is to remand the case to the District Court for review of the full administrative record.

must be viewed critically. If the District Court decides that additional explanation is necessary, that court should consider which method will prove the most expeditious so that full review may be had as soon as possible.

Reversed and remanded.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 1066.—OCTOBER TERM, 1970

Citizens to Preserve Overton

Park, Inc., et al.,

Petitioners,

v.

John A. Volpe, Secretary,

Department of Transportation, et al.

On Writ of Certiorari to
the United States Court
of Appeals for the
Sixth Circuit.

[March 2, 1971]

Separate opinion of MR. JUSTICE BLACK, with whom MR. JUSTICE BRENNAN joins.

I agree with the Court that the judgment of the Court of Appeals is wrong and that its action should be reversed. I do not agree that the whole matter should be remanded to the District Court. I think the case should be sent back to the Secretary of Transportation. It is apparent from the Court's opinion today that the Secretary of Transportation completely failed to comply with the duty imposed upon him by Congress not to permit a federally-financed public highway to run through a public park "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park. . . ." 23 U. S. C. § 138; 49 U. S. C. § 1653 (f). That congressional command should not be taken lightly by the Secretary or by this Court. It represents a solemn determination of the highest law-making body of this Nation that the beauty and health-giving facilities of our parks are not to be taken away for public roads without hearings, fact-findings and policy determinations under the supervision of a Cabinet officer—the Secretary of Transportation. The Act of Congress in connection with

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other Federal Highway Aid legislation,¹ it seems to me, calls for hearings, hearings that a court can review, hearings that demonstrate more than mere arbitrary defiance by the Secretary. Whether the findings growing out of such hearings are labeled "formal" or "informal" appears to me to be no more than an exercise in semantics. Whatever the hearing requirements might be, the Department of Transportation failed to meet them in this case. I regret that I am compelled to conclude for myself that, except for some too-late formulations, apparently coming from the Solicitor General's Office, this record contains not one word to indicate that the Secretary raised even a finger to comply with the command of Congress. It is our duty, I believe, to remand this whole matter back to the Secretary of Transportation for him to give this matter the hearing it deserves in full good-faith obedience to the Act of Congress. That Act was obviously passed to protect our public parks from forays by road builders except in the most extraordinary and imperative circumstances.² This record does not demonstrate the existence of such circumstances. I dissent from the Court's failure to send the case back to the Secretary, whose duty has not yet been performed.

¹ See 23 U. S. C. § 128 and regulations promulgated thereunder, 24 Fed. Reg. 727-730 (1969).

² See also *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, — U. S. —, (1970) (dissents from the denial of certiorari).

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[March 2, 1971]

MR. JUSTICE BLACKMUN.

I fully join the Court in its opinion and in its judgment. I merely wish to state the obvious: (1) The case comes to this Court as the end product of more than a decade of endeavor to solve the interstate highway problem at Memphis. (2) The administrative decisions under attack here are not those of a single Secretary; some were made by the present Secretary's predecessor and, before him, by the Department of Commerce's Bureau of Public Roads. (3) The 1966 Act and the 1968 Act have cut across former methods and, here, have imposed new standards and conditions upon a situation that already was largely developed.

This undoubtedly is why the record is sketchy and less than one would expect if the project were one which had been instituted after the passage of the 1966 Act.